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LAW

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DIVISION - II

THE LAW OF PROPERTY AND EASEMENTS

VOLUME - II

LESSONS : 6 TO 10

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Lesson – 6

Law of Mortgages-Sections 67 to 104

Remedies of the mortgagee : These can be divided under two heads

I. Personal remedy : Section 68

II. Remedy against mortgaged security i.e, hypotheca.

1. a) Judicial sale, b) Foreclosure : Section 67
2. Possession : Section 72 and 76
3. Private Sale : Section 69
4. Appointment of Receiver : Section 69A

I. Personal Remedy :

Section 68. This personal remedy consists of a right to sue for the mortgage-money. It says: "(1) A mortgagee has a right to sue for the mortgage-money in the following cases and no others namely :-

a) Where the mortgagor binds himself to repay the same :

b) Where by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render, the whole security sufficient, and the mortgagor has failed to do so.

c) Where the mortgagee is deprived possession of his security by or in consequence of the wrongful act or default of the mortgagor:

d) Where the mortgagee being entitled to the whole or part of mortgaged property, the mortgagor fails to deliver the same to him or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor.

Provided that, in the case referred to in clause a) a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage - money.

2) Where a suit is brought under clause : a) or clause b) of sub-section (1) the court may, at its discretion stay the suit and all proceedings therein, notwithstanding any contract to the contrary until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, retransfers the mortgaged property". This is an amended section.

The remedy provided by this section is alternative and additional to any remedy to which mortgagee may be entitled. Thus if the mortgagor fails to give possession to the mortgagee, the latter is not bound to sue under clause (d) of this section, but is at liberty to bring a suit for possession. An usufructuary mortgage who is entitled to possession but not given it, may sue at once for the money under this section instead of suing for possession. If a mortgagee by conditional sale who is entitled to obtain possession fails to get possession of the mortgagee properly he is not obliged to sue at once for mortgaged money under the section, but it is open to him to sue foreclosure under section 67.

This section is an enabling section. Ordinarily the mortgagee has no right to sue for the maritage-money in the absence of a personal covenant. This section provides under what circumstance the mortgagee is entitled exercise this right. Even if under the first instance the mortgagor is under no

personal liability to pay such lability may arise under clauses (c) or (d) of this section.

Under two cases a mortgagee can file suit for the mortgage money :-

1) Where there is a personal covenant viz, simple,English and anomalous mortgage in which there is a personal covenant-Section 68 cl. (a) In an equitable mortgage also where the mortgagor has bound himself to pay the mortgage money. Being a personal covenant it can be enforced against the mortgagor only and not against transferees-provide to the section.

2) Where there is a failure of consideration of the mortgaged security.

(i) Where for no fault of the mortgagor or mortgagee the security becomes insufficient Expl. cl. (b.) (Lost by fire or flood). Clause (b) deals with alternative security. The explanation to section 66 states when security becomes insufficient. "Security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one third, or, if consisting of buildings, exceeds by one- half, the amount for the time being due on the mortgage."

This clause will not apply if the destruction is due to the negligence of the mortgagee or there is contracted obligation to meet such situation. But prior to the suit the mortgagee should call upon the mortgagor to furnish other security.

(ii) Where the security is lost by reason of mortgagor's wrong ful-act clause (c) : We can add here that if the wrongful act is that of the mortgagors representative, this clause will apply.

(iii) Where the mortgagee fails to deliver possession when the mortgagee is entitled to possession- clause (d).

The right of personal recovery conferred by clauses (c) and (d) exists independently of, and is not taken away by any personal covenant to repay contained in the mortgage deed. Even when a suit under the personal covenant is barred, a right to sue for the money is available to him under these clauses if he is deprived of his security.

Sub-section (2) of section 68 makes it clear that where the personal remedy arise under clauses (a} and (b) of sub-section (1) the court may direct the mortgagee to exhaust his remedy against the hypotheca before seeking the personal remedy- The right to proceed against the hypotheca is not by the institution of a suit under the section.

Where a portion of the security alone is lost, the question is can the mortgagee pursue the personal remedy and at the same time retain the other portion of the security? Section 68, sub-suc 2 says he cannot do so. The mortgagee can have only either of the remedies if the loss is not due to the fault of the mortgagor.

II. Remedies against the Security' (1) (a) Right of Sale (Judicial) and (s) Right of foreclosure-Section 67 lays down :

In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become due to him, and before at decree has been made for the redemption of the mortgaged property, or the mortgage money has been paid or deposited as hereinafter provided, a right to obtain from the court a decree that mortgagor shall be absolutely debarred of his right to redeem the property, or a decree that the property be sold.

A suit to obtain a decree that a mortgagor shall be absolutely debarred of his right to redeem, the mortgaged property is called a sue for foreclosure.

Nothing in this section shall be deemed (a) to authorise any mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose to institute a suit for foreclosure or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale : or

b) to authorise a mortgagor who holds the mortgage rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or

(c) to authorise a mortgagee of a railway, canal or other works in the maintenance of which the public are interested, to institute a suit for foreclosure or sale : or

(d) to authorise a person interested in part only of the mortgage money to institute a suit relating only to a corresponding part of the mortgaged property unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage".

Rights of sale (judicial) :

In English law this remedy is available universally. But in India it is available only for a few mortgagees, where there is a personal covenant accompanied by the right of Sale-simple, English, equitable and anomalous.

The suit for sale must be filed :

(i) after the mortgage money has become due :

(ii) the mortgagee must bring the suit before the mortgagor files a suit for redemption :

(iii) the mortgagor ought not to have deposited the amount into the Court-section 83.

When suit is filed for judicial sale, the procedure is regulated by Order 33 Rule 4 of C.P.C. The Court in that case passes two decrees (a) preliminary decree; declaring the mortgagor can redeem within 6 months, (b) final decree. If the mortgage amount is not paid within the period mentioned, then it could be sold. The mortgagor can redeem till the actual sale takes place or sale is confirmed. (b) Foreclosure : Section 67.: Foreclosure is defined in the section itself in para 2 as a suit to obtain a decree that a mortgagor shall be absolutely deferred of his rights to redeem the mortgaged property.

Under section 67 cl. (a) This remedy is restricted only to two cases and they are a mortgage by conditional sale and an anomalous mortgage, with a proviso for foreclosure. Even in these two cases the court has discretion not to grant foreclosure but only grant a remedy of sale. In a decree for foreclosure there are always two decrees like preliminary and final. Till the final decree is passed, it is open to the mortgagor to redeem.

Section 67 (c) is to the effect, when there is a hypotheca in which the public are interested the remedy of both foreclosure and available; The remedy here is appointment of receiver.

Clause (d) states that there is no partial foreclosure. This corresponds to the rule that ordinarily there will be partial redemption.

Again it must be remembered, that as the mortgage security is indivisible, it cannot be split up. The integrity of the mortgage should be kept intact. Let me illustrate for you this rule-

Mortgagor }	1 st Mortgagee
	2 nd Mortgagee
	3 rd Mortgagee

One of the three mortgages cannot proceed against a portion of the hypotheca. In Neelkanta v. Suresh the Privy Council held : the allowing of partial foreclosure will lead to inconvenience and cause great embarrassment. The Privy Council explained the position of the co - mortgagee in - Sunita Bala v. Dharasundari . The fact of the case were as follows :- in A compromise between these two widows and reversioner a charge was created in favour of the two widows, at Rs.80,000/ - for each one. So a charge of Rs. 1,60,000 was created in favour of both the widows. The property was conveyed to these two mortgagees as tenants in-common and there was no provision to pay separately. One of the widows wanted to file a suit for sale to enforce the charge. The other widow refused to join as plaintiff, therefore she was impleaded as defendant. On the question whether one of the mortgagees could file a suit for sale of half the property.

The P.C. held - "A co-mortgagee can file a suit if see takes care to include the other unwilling co-mortgagees either as defendant or as plaintiffs. Where the co-mortgagees are unwilling to join the suit there is no other remedy open to the co-mortgagee who wants a decree in her favour. The court in such a case will pass a decree, only in favour of the plaintiff there being no decree in favour of the other unwilling co-mortgagee" But it is pointed out here. So far as the other co-mortgagee (or co-mortgagee's) is concerned, her right is not extinguished. So she can bring a suit for recovery of her share of the sale proceed followed in Gopalaswami v. Nataraja A.I.R. (1949) Mad.17.

Exceptions to the rule against partial foreclosure :

The later portion of clause (b) there is an exception to this rule "unless the mortgagees have severed their interest with the consent of the mortgagor". The consent, please note, may be express or implied. Or again, this severance may either be by act of parties, or even by a decree of court.

Vijaya Bushanammal v. Evalappa, One of the mortgagees filed a suit for only a share of his debt and obtained a decree without any objection to the maintainability of the suit. There after his co-mortgagee filed a suit for the recovery of his share. It was objected to on the ground that there was no severance with the consent of the mortgagor : so as to enable the mortgagee to file a suit for his portion of the security.

Held, a decree of a court has greater effect than the consent of he mortgagor, and thus the previous suit effected a severance of the mortgage security and hence it was held to be valid. So where a decree is passed, the consent of the mortgagor is implied.

DOCTRINE OF CONSOLIDATION

The remedy of foreclosure is subject to the remedy of consolidation laid down in sections 61 and 67A.

English law :

A mortgagee who holds two or more distinct mortgagees covering different properties of the same mortgagor may in certain circumstances, have a right to consolidate the mortgagor i.e. he may decline to allow the mortgages to be cleared off separately any may retain all the properties as security until all money due on every mortgage has been paid. The simplest case of consolidation is : Where one mortgagor, has created more than one mortgage of different properties, in favour of one mortgages, the mortgagee can here insist that the mortgagor should redeem all his mortgage or none.

The basis of the mortgagee's right to assert arises not out of contract but merely out of the practice that is followed in equity courts. The principle underlying this doctrine is that "he who seeks equity, must do equity". If the mortgagor fails to pay his money on the due date he forfeits right of redemption under common law and his right of redemption is available

only in equity. Equity in such a case says: "that the mortgagor, shall not be allowed to redeem one property which was sufficient security for the debt charged upon it and yet at the Same time leave the mortgagee, with another estate which is insufficient for the debt covered under the mortgage". Liability of consolidation is part of the price paid by a mortgage for the court's assistance to recover the estate which he lost at law

At present in English law, consolidation is abolished as against mortgagors. A mortgagor has an option to redeem either all mortgages or separately. This rule is enacted in our section 61. But the consolidation against mortgages still remains intact. This rule we find in our section 67A.

Indian law of Consolidation :

Section 61 and 67 A- Sections 61 deals with right to redeem separately or simultaneously. "A mortgagor who had executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary, when the principal money of any two or more of the mortgages have become due be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.

Section 67 A - says when a mortgagee is bound to bring one suit on several mortgages: "A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree on any one of the mortgages shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage money has becomes due".

Under section 67 A certain conditions have to be fulfilled if the section is to apply :-

1. There must be two or more mortgages.

2. The mortgages must have been effected by the same mortgagor. In Sharp v. Richards S. Mortgagor mortgages to R. mortgagee 4 leasehold house. C, Mortgagor mortgages to R. mortgagee No. 7 leasehold house. Both S and C sold their equities of redemption to Plaintiff. Plaintiff wanted to redeem No. 7 leasehold house separably. R objected claiming consolidation it was held the right of consolidation can arise only when all the mortgages were originally made by the same mortgagor.

But the right may be exercised by the person in whom different mortgages have become united though originally they had been made to different mortgagor. In Vint v. Podget

A mortgaged an estate to x

A mortgaged another estate to y

The equity of redemption of both the estates were mortgaged to the defendant.

The first two mortgages became vested in the plaintiff who claimed consolidation. The claim was held to be well founded. Thus where the owner of different properties mortgages them to different persons and the mortgages afterwards become united in title the holder of the mortgages has a right to consolidate them.

3. The mortgage money should have become due on all mortgages.

4. The words "has a right to obtain" - the mortgagee must have the same kind of relief against all mortgages viz., either sale or foreclosure.

The section is subject to a contract to the contrary.

SECTION 61 :

The old section referred "mortgages of different prop-

erty" and did not apply to mortgages on the same property. But there has been a difference of opinion that even in cases where several mortgages have been executed over the same property, the section applies.

Under the new section it is clear that even if the mortgages are of the same property, the mortgagor may redeem each separately unless restrained by a contract to the contrary. The effect of the present section is to abolish altogether consolidation so far as the mortgagor is concerned.

2. Getting into possession - Sections 72 and 76 : Section 72 deals with the rights of the mortgagee in possession and section 76 with the liabilities of the mortgagee in possession.

Section 72 : says. "A mortgagee may spend such money as is necessary.

a) ....

b) for the preservation of the mortgaged property from destruction, forfeiture of sale;

c) for supporting the mortgagor's title to the property;

d) for making his own title thereto good against the mortgagor and;

e) when the mortgaged property is a renewable leasehold, for the renewal of the lease;

and may, in the absence of a contract to the contrary, and such money to the principal money, at the rate of interest payable on the principal and where on such rate fixed, at the rate of nine percent per annum. Provided that the expenditure of money by the mortgagee under clause (b) or clause (c) shall not be deemed to be necessary unless the mortgagor has bean called upon and has failed to take proper and timely steps to preserve the property or to support the title.

Where the property is by its nature insurable, the mortgages may also, in the absence of a contract to the contrery, insure and keep insured against loss or damage by fire whole or any part of such property and the premiums paid for any such insurance shall be added to the principal money with interest at the same rate as is payable on the principal Money or where no such rate is fixed at the rate of nine percent per annum.

Nothing in this section shall be deemed to authorise the mortgagee to insure when an insurance of the property is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is hereby authorized to insure'

The old section applied only to usufructuary mortgages because the first para, reads as. "when during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as necessary". This has been now altered to include all mortgagees for clauses (b) (c) (d) and (e) apply whether the mortgagee is in possession or not.

Clause (b) :

Preservation from destruction, forfeiture or sale-these words also occur in section 63 and necessary expenditure is covered by section 76 (d) and on improvements by section 63A.

There is also a destruction, of the security in the abstract sense when the mortgaged property is forfeited or sold, Section 76 (c) makes the mortgagee in possession to pay all public charges etc., non-payment of which would involve foreclosure or sale. Under this section he himself can pay the charges, in case the mortgagor commits default in payment and add that amount to the mortgage money.

Clause (c) :

Supposing the mortgagors title. The mortgagee is

entitled to the costs of litigation incurred in defending the mortgagor's title to the property. Section 65 (b) imposes a similar duty on the mortgagor. From this it must be noted that the mortgagees right arises when the mortgagor is negligent where his title is concerned.

Clause (d) :

Defending mortgagee's title against the mortgagor, the former is entitled to costs of enforcing the mortgage. But the mortgagee is not entitled to costs while defending his title against a stranger. In Parker v. Walkins Wood, V.C. said; It some litigious person chooses to contest his (the mortgagee's) title to the mortgage, that should not affect the parties interested in the equity of redemption, unless they can be shown to have concerned in or assisted the litigation".

Clause (e) :

Renewal of leases. Section 65 (d) does not give the mortgagor the right to renew a lease. But under the clause the mortgagee may do so in order to maintain his security, and if he pays a fine for the renewal, it is added to the mortgage money.

Contract to the contrary :

The rights of the mortgagee can be altered by the contract to the contrary.

Insurance :

If the mortgagor has not insured the property, then the mortgagee may add, the premium paid to the mortgage debt. Section : 76 "When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property:-

a) he must manage the property as a person of ordinary prudence would manage it if it were his own.

b) he must use his best endeavors to collect the rents and profits thereof :

c) he must, in the absence of contract to the contrary out of the income of the property, pay the Government revenue, all other charges of a public nature and the rent accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property maybe summarily sold:

d) he must, in the absence of a contract to the contrary make such necessary repairs of the property as he can pay for out of the rents and profits thereof after deducting from such rents and profits the payments mentioned in cause (c) and the interest on the principal money :

(e) he must not commit any act which is destructive or permanently injurious to the property ;

(f) where he has insured the whole or any part of the property against loss or damage by fire; he must, in case of such loss or damage; apply any money which he actually, receives under the policy or so much thereof as may be necessary, in reinstating the property; or, if the mortgagor so directs, in reduction or discharge of the mortgage money.

g) he must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and at any time during the continuance, or the mortgage give the mortgagor at his request and cost, true care of such accounts and of the vouchers by which they are supported.

h) his receipts from the mortgaged property, or where such property is personally occupied by him, a fair occupation rent in respect thereof, shall after deducting the expenses properly incurred for the management of the property and the collection of rents and profits and other expenses mentioned in the clauses (c) and (d), and interest thereon, be debited against him in reduction of the am[illegible]

time due to him on account of interest and, so far as such receipts exceed any interest due, in reduction or discharge of the mortgage money; the surplus, if any or shall be paid to the mortgagor; (i) When the mortgagor tenders or deposits in manner here in after provided the amount for the time being due on the mortgage, the mortgagee must, not withstanding the provisions in the other clauses of this section, account for his receipts from the mortgaged property from the date of the tender from the earliest time when he could take such amount out of Court, as the case may be, and shall not be entitled to deduct any amount therefrom account of any expenses incurred after such date or time in connection with the mortgaged property. It the mortgagee fails to perform any of the duties imposed upon him by this section, he may when accounts are taken in pursuance of a decree made under this chapter, be debited with the loss if any, occasioned by such failure."

This section enumerates the statutory duties of a usufructuary mortgagee or of a mortgagee in possession. The section is quite clear and no further explanations are necessary.

Private Sales :

Section 69 - This remedy is available to three classes of persons

i) A mortgages under an English mortgage and neither, of the parties is a Hindu, Muslim or Buddhist or any other community notified in the Gazettes.

ii) A mortgages in favour of the Government where this right is expressly reserved, and not otherwise.

iii) Where in mortgages this power is expresaly conferred and the property is situated within the town limits of Calcutta, Bombay and Madras and those towns notified in the Gazettee in time to time.

Under section 69. sub-section 2 there are certain conditions to be satisfied for the exercise of the power of private sale. They are firstly, a written notice has to be served upon the mortgagor calling upon him to pay the amount with interest due thereon. This right becomes exercisable only after 3 months of such service of notice. Where there are several mortgagors, it is enough, that the notice is served upon one of the mortgagors. Secondly, where the mortgages has not paid interest amounting to Rs. 500/- and above for there this after the money has become due.

Effect of Private sale :

Section 69, sub- sec. 3 : The purchaser in such a sale gets unimpeachable title to the property. The remedy of the mortgagor, is to sue for damages, if the mortgagee sells without complying with the provisions of sub- sec. 2.

It is open to anyone to purchase the property except the mortgagee, for he himself cannot be both buyer and seller. The duty is cast upon the mortgagee in selling the property to act honestly and fairly. When he fails to act so, the Court will interfere by way of an injunction.

The position of the mortgagee during the sales, he is neither a trustee nor agent of the mortgagor because by selling the property he is projecting his own rights. But he becomes a trustee to the mortgagor later on; that is after the sale there is an excess of sale proceeds that is left in his hands. Till he actually hands over the money, he is the trustee of the mortgagor for that excess.

English law :

In England the power of private sale is the incident of all mortgages, unless it is excluded or limited by the mortgage deed. In India fearing hardship to the mortgagor this section acts are a salutary check against such abuses by strictly forbidding the powers of sale in mortgage executed in the moffusil.

Distribution of sale proceeds :

Section 69 sub- sec 4 : It is in the following order; i) All prior mortgages have to be satisfied a ii) to reimburse himself for all costs incurred, (ii) in discharge of his own mortgage money (iv) the balance of the sale proceeds if any to the mortgagor.

If must be noted here that the power of sale passes with the assignment of the mortgage, so that it can be exercised by the assignee.

4) APPOINTMENT OF RECEIVER - SECTION 69A.

A mortgagee in possession is responsible for prudent management and is liable to be called upon to account on the ground of neglience or wilful default as we have already seen. To avoid the liability and at the same time to preserve the advantages of possession the practice grew up in England at first to provide for appointment of a receiver by either the mortgagor or the mortgagee.

Students should note that a mortgagee cannot appoint a Receiver until the power of sale is exercisable under section 69 (2) Therefore the mortgagee has to wait for three months after service of notice on default in payment of principal. As this right under section 69A is only available to the 3 classes of persons order section 69, the conditions under section 59 (2) are to be complied with.

Order 40 Rule 1 of the Code of civil Procedure speaks of the appointment of a Receiver incases where the court considers it just and convenient.

Under this section the person to be appointed may be any one of the three persons viz, (1) a person agreed to between the mortgagor and the mortgagee, at the time of execution of the mortgage (2) Any person agreed to subse-

quently (3) Where the parties do not agree, they can apply to the court to appoint a suitable person.

The Receiver so appointed holds the position of an agent of the mortgagor (section 69A (3), and his duties are ; (order XL.R.3 (d) C.P.C. (1) to furnish security : (2) to keep regular accounts : (3) to pay the money as he directs: (4) be responsible for and losed occasioned to the property by his negligence.

The money in the hands of the Receiver should be disbursed in the following order (Section 69 A 8] : (i) to Pay all taxes and rents: 2) to pay the prior mortgages: 3) his commission; 4) interest on the mortgagee, 5) the principal money due on the mortgage and the balance to be handed over to the mortgagor.

It is open to the Receiver to gat advise of the court on simple questions concerning management of administration of mortgaged property-S.69 A (10)

Doctrine of Substituted Security Section 73 :

Right of the mortgagee to proceeds of revenue sale of compensation on acquisition.

Section 73 says "(1) where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property and such failure did not arise from any default of the mortgagee, the mortgagee, shall be entitled to claim payment of the mortgage money in whole or in part, out of any surplus of the sale proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

(2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Act, 1894, or any other enactment for the time being in force pro-

viding for the compulsory acquisition of immovable property, the mortgagee shall be entitle to claim payment of the mortgage money in whole or in part, out of the amount due to the mortgagor as compensation.

(3) such claims shall prevail against all other claims except those of prior encumbrances, and may be enforced notwithstanding that the principal money on the mortgage has not become due".

By now it is clear to all of you that the mortgagee has got certain rights to proceed against the security. So this section it tended to protect these rights. The whole object is that the mortgagee's security should not be diminished. If portions of the property are converted into cash, that cash also should be available to him as a part of his security. This right given under this section is over and above the right he has under the law to realise the mortgage debt by enforcing his security against the mortgaged property or property substituted therefore. But where the security is diminished before suing the mortgagor the mortgagee is under an obligation to issue a notice to the mortgagor calling upon him to furnish fresh security; and if the mortgagor, furnishes the fresh security, the mortgagee has a right to this substituted security.

This doctrine of substituted security found in Section 73 is applied in two cases :-

(i) Where the mortgaged property is sold for arrears of revenue or rent due to the Government. The balance is substituted security to which the mortgagee has a right. But the sale should be free of encumbrances. But if the sale is subject to encumbrances then the section will not apply. In such a case his rights are intact against the property and so has no rights against the surplus sale proceeds. Because the object of the section is to see that the security is not diminished and not to enlarge the security, In 'Pattammal v. Corporation of

Madras it was observed: 73 from its very language can apply only to sales in which property is sold free of all mortgages".

Default of mortgagee :

In Nazar Alley Khan v. Ojoodhyaram Khan held : A Govt. sale for arrears of revenue generally gives a title against all the world- "but a fraudulent purchase at such auction sale by a mortgagee will not defeat the equity of redemption". But where there is no fault on his part, the mortgagee can get an irredeemable title. If sale is due to mortgagor's default and he himself purchases it will do subject to the mortgages.

(ii) where the mortgaged property is acquired under Land Acquisition. Act by the Government, the mortgagee is entitled to claim payment out of the sum awarded as compensation even after it has been paid to the mortgagor.

Benefits of Renewal of Lease : Sections 64 and 71

Section 64 provides that if a mortgagee obtains a renewal of a lease which is the subject matter of the mortgage the mortgagor will on redemption have the benefit of the new lease. Section 71 provides that if a mortgagor obtains a renewal of the mortgaged lease the mortgagee will, for the purposes of the security be entitled to it. The principle rests on the theory that in such cases the new lease is a graft upon the old lease and forms part of the original security. The new lease cannot be strictly called an accession and therefore has been dealt with separately.

Section 77 deals with receipts in lieu of interest. It says "Nothing in section 76, clauses (b), (d), (g) and (h) applies to cases where there is a contract between the mortgagee and mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in 'possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal".

DOCTRINE OF PRIORITY

Section 78, deals with priority. It provides :Where through fraud, misrepresentation, or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee."

In discussing this section, it is necessary that we know the meaning of puisne mortgagee and sub-mortgagee. It is open to the mortgagor to create successive mortgages on the same property so long as there are persons to advance money. A puisne or measne mortgagee is a person in whose favour, there exists a second or a later mortgage over the same property;

Likewise, it is open to the mortgagee to mortgage further his interest. It is called a sub-mortgage and the mortgagee of this submortgage is called a sub mortgagee.

Usual principle of law is that one who is prior in time has a strong position in law. According to this principle priority of mortgages depends upon the respective dates of their creation, the earlier in date having precedence. Section 48, we have already seen determines priority of successive mortgages by enacting the rule of *quip nior est tempore potior est jure* The first exception to this rule contained in the section under discussion viz. section 78. This section says that a prior mortgagee loses his priority if he, induces the subsequent mortgagee to advance money under three cases, of (i) fraud (ii) misrepresentation and (iii) gross negligence; and in order to attract this section to a given case it is necessary to prove that the fraud, misrepresentation or gross negligence of the prior mortgages was the proximate cause for the advance of money by the subsequent mortgages. If it is only one of the contributory factors the election does not apply.

(i) Fraud : Fraud here has the same meaning fraud in section 17 of the Indian Contract Act. which says that non - disclosure is not fraud unless there is an onerous duty to speak.

(ii) Misrepresentation : The transfer of Property Act, gives no meaning of misrepresentation So we have to fall back upon section 18 of the Contract Act. In Raman Chetty v. Steel Bros, the prior mortgagee had concealed his mortgagor. He represented to the second mortgage that there was no prior mortgage. He also allowed a recital to that effect in the mortgage deed. It was held that priority of first mortgagee was lost by reason of his misrepresentation.

(iii) Gross Negligence : Gross negligence means negligence a mounting to fraud and the tendency of the English Courts is to refuse to postpone the prior encumbrancer merely on the ground of gross negligence unaccompanied by fraud In Euans v.Bicknell Lord Eidon held mere negligence is not sufficient to deprive a mortgagee of his priority. His negligence must be such as to amount to evidence of fraudulent intention such as to lead the court to the conclusion that he is an accomplies in fraud".

The test that is applied under Indian law is taken from the judgement of Lord Selbourne in Dixon v. Mukreston "Where there is a duty upon a person to do a particular act he Must be presumed to know what ought to do. The consequence of his neglect in not doing that, will be regarded as what is called gross or would negligence."

This rule was applied in the case of Lyolds Bank v. Guzdar & Co. The facts of case were, A deposited title deeds of his property with Bank N (National Bank) to secure an overdraft. A then asked for a return of deeds saying that he wanted to sell the property and clear the overdraft. The usual practice was for the prospective purchaser to have inspection of the title deed in the office of the Bank's solicitor's. But A said if the purchaser came to know that there was a mortgage over the property, he would not get a good prices so the Bank manager returned the title deeds to A. A

then borrowed money from Bank L (Lyoids Bank) by depositing the same title deeds falsely representing that there was no encumbrance in the property. The question is as between Bank N and Bank L. Who has priority.

It was held Bank N was guilty of gross and wilful negligence in surrendering the title deeds to A. Therefore, the mortgage to Bank L has priority over the mortgage to Bank N.

In Semarspuri Chetty v. Thangavelu Chetty A.I.R. 1938 Mad 87 the mortgagee not only induced the mortgagor to delay the registration of the 'mortgage deed, but also parted with the documents till registration. He was thus able to create a second mortgage. Held: Any act or omission on the part of the prior mortgagee which has enabled the mortgagor to deal with the properly as if it was not encumbered would be gross neglect within the meaning of this section".

Doctrine of Taking :

English Law - Prior to 1926 great sanctity was attached to the legal estate and therefore arosing the doctrine of take where a later equitable mortgagee acquiros the earlier legal estate, he gained priority over his earlier mortgagees provided he had non of them when he lent money

Supposing the value of the estate is £1000/-
Mortgaged it for £ 500 to by way of legal mortgage.
2nd mortgage for £ 300 to B by equitable mortgage.

3rd mortgage for £ 300 to C by way of equitable mortgage C by acquiring the legal estate of A can claim priority over B. Thus he can demand the mortgagor to pay both his mortgage and also mortgage in favour of A.

This doctrine was called the Doctrine of Taking since it enabled the third mortgage to take on his advances to the legal mortgage and claim priority over the intermediate encumbrances.

Where a legal mortgagee makes further advances he can claim priority for the further advances, by virtue of legal estate. Here must point but that prior to 1926 in England the first mortgage alone was a legal mortgage, all the other mortgages over the same property had to be equitable mortgage. This is otherwise known as the rule in Hokinson v.Rolt. Here the mortgager created a mortgage in favour of A, on the understanding that the mortgage would cover his further advances Later a second mortgage was created infavour of B we had notice of the mortgage in favour of B. On the question whether A could take on his further advances with the first mortgage the Majority of the House of Lords held, A can have no priority for his further advances. Where there is an understanding further advances it is open to A to refuse to make such advances. Where he chooses to do so, he must do so only subject to the rights of the other mortgagee viz. B because he had notice of B's mortgage at the time of further advance.

After 1925 :

By the law of Real Property Act, 1925, the distinction between legal and equitable mortgages has been done away with and there is taking in relation to an equitable mortgagee acquixing a prior legal estate. It has been abolished.

As to taking in relation to further advance, it is still retained with slight modifications. Section 94 of the Act of 1925 enacts that a prior mortgagee's further advances can have priority :- (1) If an arrangement has been made with other mortgages; (ii) if at the time of further advance no notice of the subsequent mortgage : (iii) where the mortgagee imposes upon him an obligation to make further advances.

Indian Law :

After 1929, the doctrine of taking has very limited application. It is prohibited by section 93, but exception is section 79.

Section 93 states :

No mortgagee, paying off a prior mortgage whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security; and except in the case provided for by section 79 no mortgagee making unsequent advance, to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in aspect of security for such subsequent advance",

Section 79 states :

"If a mortgage is to secure future advance the performance of an engagement or the balance of a runnings account expresses the maximum to be secured thereby, a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to prior mortgages in respect of all advances to the prior mortgagee not exceeding the maximum though made or allowed with notice of the subsequent mortgagee".

Section 72 is based on the minority view as stated by Lord Cranworth in Hopkinson v. Rolt. There are two conditions to be fulfilled under section 79 in order that the further advances should claim priority :-

(i) There must be an agreement mentioning the maximum limit upto with the further advances could be made.

(ii) The second mortgagee has notice of the prior mortgagee if he is to lose his priority,

But if under the mortgage no maximum was expressed or if the subsequent mortgagee had no notice of the prior mortgage, the prior mortgagee will have no priority in respect of such advances. Section 93 is thus complemontary to section 79.

DOCTRINE OF MARSHALLING - SECTION 81

The doctrine of Marshalling and the allied Doctrine of Contribution are invoked for the purpose of adjusting the rights of all parties interested in the mortgage security. The former to adjust the rights of the mortgagee inter so and the latter to adjust the rights of the mortgagors where there are two or more co-mortgagors.

The right of marshalling exists for the benefit of a junior encumbrancer to protect his lien; it does not apply to mortgages only but is applicable generally to sales, payment of legacies and the execution of settlements - Section 56.

Section 81 reads; "If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is in the absence of contract to the contrary, entitled to have the prior mortgage debt satisfied out of the property or properties not mortgaged to him so far as the same will extend but not so as to prejudice the rights of the prior mortgages or of any other person-who has for consideration acquired an interest, in any of the Properties".

The important point that is, to be noted is, that this section applies only in the absence of a contract to the contrary, prior to the 1929 amendment, a second mortgagee could claim the benefit of marshalling if he had notice of the earlier encumbrance. Now the condition as to notice is dispensed with. The Amending Act has brought the section into line with the English rule. A simple case of marshalling is given below.

M (Mgr.) mortgages estates A & B for Rs. 1500/- to X Mortgagee.

M (Mgr). mortgages B for Rs. 750/- to Y Mortgagees.

X has a right to proceed against both A and B. X can exercise his right against A alone or against B alone. If X chooses

to exercise his right against B alone, Y will be prejudiced in that he will not get his money. But at the same time A is sufficient to satisfy the debt to X. In this case it is open to Y to ask X to proceed against item A first, the one which if not mortgaged to him (Y)

The doctrine has been stated by Waldock: If the owner of two estates (or funds) Blackacre and Whiteacre, mortgages both to X and subsequently mortgages Blackacre only to Y, then Y as against the common mortgage has the right to say that X's claim must be treated as satisfied out of Whiteacre, so far as that is possible, and that, Blackacre shall be left to meet his own claim's. In Aldrich v. Cooper the first creditor had a right of proceeding against the freehold and copyhold property of the debtor. The second creditor had a right of proceeding only against freehold property. In these circumstances, if the first creditor were to proceed against the freehold property in the first instance, the rights of the second creditor would be imperilled. The underlying principle is "that it should not depend upon the will of one creditor to disappoint another". The decision of this case is the foundation of one equitable doctrine of marshalling.

CONDITIONS FOR THE APPLICATION OF THE DOCTRINE

1. Common debtor under all the mortgages :

2. No prejudice to prior mortgages or the third parties who have acquired rights under the property mortgaged, such as transferees for value.

3. There should be no contract to the contrary.

4. This right is available not only against the mortgagee but also against the mortgagor.

A lessee has no right to claim marshalling. A surety who has given his property as security for the debt may require the creditor to resort to the other property of the debtor first.

DOCTRINE OF CONTRIBUTION-SECTION 82

The right to compel contribution under section 82 may arise when the several properties belong to several owners. The Principle as stated by Fisher is "If several estates whether of one or of several owners, are mortgaged for one debt, the several estates shall contribute rateably to the debt". The mortgagee is entitled to recover his mortgage debt out of any part of the mortgaged property. When the mortgagee is satisfied by the sale of some items of the hypotheca the other items are also discharged from the encumbrance. In such a case the items which have cleared the whole mortgage have borne an unfair share of the burden. The owner of those item is given a right of contribution, i.e a right to call upon the holder of the unsold portion to contribute his share of the mortgage debt.

Section 82. "Where property subject to a mortgage belongs to two or more parsons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary liable to contribute rateably to the debt secured by the mortgage, and for the purpose of determining the rate at which each such share or part shall contribute, the value there of shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on the date.

Where, of two properties belonging to the same owner, one is mortgaged to secure one debt and then both are mortgaged to secure another debt, and the former debt is paid out of the former property; each property is, in the absence of a contract to the contrary, liable to contribute rateably to the latter debt after deducting the amount of the former debt from the value of the property out of which it has been paid. Nothing in this section applies to a property liable under section 81 to the claim of the subsequent mortgagee"

Contribution requires that a fund which is equally liable with another to pay a debt shall not escape because the creditor has been paid out of that other fund alone. From this it is quite clear that such of the mortgaged properties as have been sold for the realization of the mortgaged money and have thus contributed to the mortgage debt are not liable to a claim for contribution. Such a claim is only' those of owners whose properties have contributed more than the rateable share of the debt, and against those portions of the mortgage properties only, which have not contributed to the mortgage debt.

In Kashi Ram v. Het Singh Three brothers A, B and C mortgaged their joint property first to D and then E. They effected a partition. D brought suit against them and utilized his money from A's share, A then obtained a decree for contribution against the shares of B and C,B and C redeemed the second martgage and claimed contribution from A. Held that they had no right on contribution as A's share had been sold to satisfy prior mortgage debt.

But a released item is bound to contribute: and that is because the owners of part of the equity of redemption cannot be deprived of their right to contribution under this section by the action of the mortgagee in releasing another portion of the mortgaged property.

For rateable contribution the value of the properties should be it stood at the date of the original mortgage, and, should not be affects by an increase or decrease in value subsequently.

Illustration : Motrtgagor M. has Estates A-Rs. 2000-

B- Rs.1,000/. mortgaged to X for Rs. 1200/-

A should contribution	Rs. 800/-
B should contribute	Rs. 400/- Ratio 2:1
A is previously mortgaged to	Y for Rs. 200/-

Para 1 of Section 82 says the mortgage amount should be deducted from the value of A.

So where mortgage to X is concerned the value of A is Rs.2,000/- Rs.2,000/- Rs.200/- i.e., Rs. 1,800/- Rs. 200/- i.e., Rs. 1,800/-

So the debt to X is to be borne thus :

A-Rs. 1800
B-Rs. 1000-9: 5

Conditions for the application of the doctrine of contribution.

1. There should be a property in which two or more persons have distinct interest or there must be several properties belonging to one or several owners (already seen).

2. Such properties or person owning them must have a common liability to contribute.

3. There should be no contract to contrary.

Condition 2 :

Common liability to contribute. The liability to contribute under this section is attached to the different shares or parts of the property. Under sec. 82 read with sec. 100, charge is created against such portions of the mortgaged property. But the question arises, whether the owner or part of his share who pays in excess of his share towards his share can claim a personal relief under secs. 69 and 70 of the Indian Contract Act. as under section 82 there is no personal liability, but only a proprietary liability.

Sec. 69 of Contract Act says that where a person under no legal liability to pay, makes payment, he can claim contribution personally against these person. But we have already seen in Kasi Ram v. Het Singh that there can be no liability for contribution against A, as under Sec. 82, it is not a personal liability but only a proprietary liability.

Condition 3 :

There should not be a contract to the contrary. Meaning of a contrary to the contract - is it only a contract between mortgagors? In Damodraswami Naicker v. Govindarajulu Naidu a joint family of father and three sons mortgaged the family property to D. On partition the arrangement was that the sons alone should pay the debt. One son sold his share to G, the second son discharged the mortgage debt and sued G for contribution of the first son's share.

Held : 1. Purchaser G was liable to pay only ¼th and not ⅓ rd as the first son's share at the time of the original mortgage as under sec 82 (2) In order to exclude such a liability there must be a clear contract to the contrary. 3.A contract to the contrary means not a contract between the mortgagors alone as in the instant case. It means a contract between the mortgagors on one side and the mortgagee on the other. 4. A third party will not be affected by any contract entered into only between the mortgagors. On the other hand the third party will be bound by any contract between mortgagors and mortgagee. So G is liable only for ¼ of the mortgage debt and not ⅓ rd.

Subject to marshalling :

The right of contribution is subject to the right of marshalling i.e., where there is a conflict between the two-marshalling will prevail.

Illustrations :

Supposing an owner of two properties x and y- mortgages.

x to A
y to B
x,y to C
x to D

- then x and y both to contribute to C's mortgage in preparation to their values after deducting from x and y the amount of A's and B's mortgagee respectively; but under the right of marshalling D could require C to proceed first against Y, if what is left of Y is sufficient for C's debt. This right of D to marshall would prevail against the right of contribution if D were to be prejudiced thereby.

Deposit in Court : Sections 83 and 84 Sections 83 says : "At any time after the principal money payable in respect of and mortgage has become due and before a suit for redemption of the mortgaged property is barred, the mortgagor of any other person entitled to institute such suit may deposit, in any court in which he might have instituted such suit to the account of the mortgagee, the amount remaining due on the mortgage". Essentials of a valid deposit: 1. It must be unconditional

2. It must be made to the account of mortgagee.

3. It must be made after the money has become due and before the right of redemption is barred.

4. The entire amount be deposited.

The deposit which satisfies all the above four requisite is only another form of leader and this is a tender through the court, and consists of two things :- (i) actual deposit in court, and (ii) notice to person entitled to withdraw it.

According to Section 84. When the money is tendered in the court, the interest ceases to run from the date of deposit. Even after this, if the mortgagee refuses, he can file a suit for redemption and can deduct the interest from the date of deposit.

A point to be noticed here is : the deposit is not valid until, notice has been served on the mortgagee, or if he is a minor, on his guardian *ad listem*.

In order that the deposit in court should operate to stop interest running, the mortgagor must have done all that has to be done to enable the mortgagee to take the amount out of court and notice must have been served on the mortgagee.

Persons who may sue for redemption Section-91: Section-91 deals with all those persons who besides the mortgagor, may sue for redemption of the mortgage security. The redemption by the mortgagor is provided for under section 60. Therefore section 91 is not applicable to the mortgagor

Section 91 says: "Besides the mortgagor, any of the following persons may redeem, or institute suit for a redemption of the mortgaged, property, namely:-

(a) any person (other than the mortgagee of the interest, sought to be redeemed) who has any interest, in or charge upon, the property mortgaged or in or upon the right to redeem the same

(b) any surety for payment of the mortgage debt or any part thereof, or

(c) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property",

Under this section it has to be seen as to who are the other persons apart from the mortgagor entitled to redeem. It must be obvious to you by now that this section does not enable, a mortgagor to redeem because it starts as *besides mortgagor.* Under this section the following persons who can be broadly divided into two categories are entitled to redeem:

(i) Persons having an interest or charge in the mortgaged property or in the right of redemption-Clause (a)

(ii) Persons who have no interest in the hypotheca or mortgaged property, or in the right of redemption such as surety and other creditors of the mortgagor.Cls.(b and c)

Under this section we shall confine our attention to the rights of 3 important persons: (1) Co-mortgagor; (2) Puisne mortgagee and (3) Sub-mortgagee.

Clause: (a) Section 91 is not confined to persons who have an interest, in the property, but extends also to persons having say interest in the right to redeem the property.

Co — mortgagor: Just like a mortgagor it is open to the co-mortgagor to redeem the hypotheca. The co-mortgagor's right to expense for redeeming up the property are laid down in section 95. He is entitled to two remedies, viz,, (i) a charge for contribution under section 82 read along with section 100 and (ii) subrogation under section 92.

Section 95 states, "where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under section 92 against co - mortgagors, be entitled to add to the mortgage money recoverable from them such proportion of the expenses property incurred in such redemption as is attributable to their share in the property..

Puisne or Mesne mortgagee:

A puisne mortgages is an assignee of the equity of redemption and is therefore entitled to redeem under this clause. A puisne mortgagee is a person who has an interest in the right to redeem, because after the creation of a first mortgage, what is left in the hands of the mortgagor is the right to redeem.

So far as the puisne mortgagee is concerned section 91 clause *(a.)* lays down the first half of the rule : "Redeem up and foreclose down" viz, redeem up. The latter half of the rule is contained in section 94. The simplest way to state this rule is as follows:, when a mortgagor create successive mortgage, a puisne mortgagee has the same rights against the posterior mortgagees as he has against the mortgagor. Sections 67 to 69 A which deal with the mortgagee's right against the mort-

gagor given the mesne mortgagee the very same rights against the mortgagor and the posterior mortgagees as they arc assignees of part of the equity of redemption. These rights of the means mortgagee are stated in *Section* 94 which says, "Where a property is mortgaged for successive debts to successive mortgagees, means mortgaged hits the same rights against mortgagee posterior to him so as he has against mortgagors".

Thus let us suppose that A, the mortgagor executes successive mortgages as follows: -

Ist mortgage by A ---- to B

2nd mortgage by A ----to C

3 rd mortgage by A --- -to D

Now C is assignee of part of the equity of redemption of A against B and has therefore the right to redeem B. For the same reason D can redeem C anJ B. So this is the first half of the rule "redeem 'up'. On the other hand B can foreclose or bring to sale A, and as part of A'a equity of redemption is transferred to C and D,B can foreclose or bring to sale C and D. This is the second half of the rule foreclose down". This is enacted in section 94

But section 94 should be read subject to section 68 (a) where in the mortgagor can sue for mortgage money only if there is a personal covenant for e.g. simple or English mortgage. Such a covenant being purely personal is not available against any transferee of the mortgagor, D being a transferee of the mortgagor, cannot be personally sued by C.

As against D - Posterior mortgage:

Section 91 (1) enacts that a mesne mortgagee is a person entitled to redeem. So C is entitled to redeem B.

Foreclose down:

Section 94 lays down that C can exercise all the rights available to B as against A and so against D. So he can ask D either to redeem him or submit to foreclosure.

As against mortgagor:

A In such a suit for foreclosure by C he has to secure for him X-the property. In that suit B may be joint for convenience, but if B is not joined, C can have relief because the rights of B can be easily preserved for he is the first mortgagee.

But in that suit D is a necessary part, for unless D's rights are adjusted simultaneously. C cannot have any remedy. The reason is at the date of creation of the second mortgage in favour of C" the security with A the mortgagor is not the same as it was the date of B's mortgage. It has become less. D therefore is a necessary party Thus C can foreclose A only the mortgagor without redeeming B but only by foreclosing D also i.e., C can foreclose D without redeeming B.

But if C wants to redeem, the first mortgage it should be done only after setting of accounts of subsequent mortgages. So C, cannot redeem B without foreclosing D.

The entire rule can be summed up as follows : C can foreclose D without redeeming B, where as C cannot redeem B without foreclosing D.

Sub-mortgagee :

A sub-mortgagee, being an assignee of the mortgagee, he is equally entitled to redeem. Ha has all remedies that are available to a puisne mortgagee.

Clause (b) Surety :

When a surety pays off the debt he stands in the shoes of the original creditor and has all the rights of the creditor to proceed against mortgagor upon the mortgage debt.

SUBROGATION - SECTION 92

SECTION-92 says "Any of the persons referred to in section 91 (other than the mortgagor) and co-mortgagor shall, on redeeming the property subject to the mortgage, have so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgage or any other mortgagee.

The right conferred by this section is called the right of subrogation, and person acquiring the same is said to be subrogated to the rights of the mortgage whose mortgagee he redeems.

A person who has advanced to a mortgagor money with which the mortgagee has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed if the mortgagor has by registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any parson unless the mortgage is respect of which the right is claimed has been redeemed in full"

Doctrine of subrogation:

Subrogation means nothing more than substitution "subrogation is substitution of one person in place of another whether as creditor or possessor of any rightful claim". The doctrine of subrogation enables a person to stand in the shoes of a creditor whom he has paid off and claim to be entitled to all the remedies open to that creditor in respect of the securities hold by him.

Reason for the doctrine :

If a person advancing money to pay off an encumbrance is not subrogated to the rights and remedies of he discharged creditor, subsequent mortgagees will gain priority to his detriment.

Kinds of Subrogation :

This substitution or subrogation may arise in two ways; either by act of parties or by operation of law. The first is called *conventional or consensual* and the second known as *legal* subrogation.

(i) ***Conventional subrogation*** : The simplest case is where A assigns his right against B to C.C is subrogated to the place of A Here C gets subrogated because of assignment.

(ii) ***Legal subrogation*** : This kind arises not because of the arrangement between the parties, but when this right is recognized *by law* under certain circumstances. Thus a subsequent mortgagee paying off a prior mortgagee on the same property, is given the same rights against mortgagee as the prior mortgagee had in respect of his mortgage. This class of subrogation rests upon the principle of natural justice and equity. One of these principles being the right of reimbursement. This principle is found enacted in section 69 of Contract Act in relation to quasi contracts. The other principle is that *he who seeks equity must do equity.*

Section 69 of the Contract Act provides that a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other. So a person paying off a prior mortgage may have two remedies (i) to proceed against mortgagor under section 69 of the contract Act, which, however confers only a personal right: which can be enforced, only in his own individual capacity and not in the right of the prior mortgagee: (ii) to exercise his right of subrogation under section 92 which gives the person paying off a mortgagee, the right to step into the shoes of the mortgagee who is paid off. He enforces his claim in the right of the original creditor. The sub mortgagee does not acquire a new charge on payment. The charge is already there. All that the acquires is the right to enforce that charge.

Sec. 92. which was introduced by the Amendment Act of 1929 provides for both legal and conventional subrogation.

Legal subrogation—Para (1) Legal subrogation occurs in four ways.

i) A puisne mortgagee redeeming a prior mortgage

ii) A Co- mortgagor redeeming the mortgage.

iii) The mortgagor's surety redeeming the mortgage is in the position of a co- mortgagor.

iv) A purchaser of the equity of redemption in mortgage.

1) ***Legal Subrogation and position of volunteer*** : Although the right of legal subrogation is the right under law of any creditor to get substituted to the place of another creditor and assert his rights yet it is not every person who discharges the mortgage debt is entitled to the right of subrogation e.g., a more volunteer to a Strainger cannot claim subrogation. This right can be claimed only by a person who is obliged to pay the debt for his own protection.

2) ***Subrogation and Mortgage*** - *Para* (1) opens with the words "other than the mortgagor": So the mortgagor cannot on discharging a mortgage debt claim the benefit of subrogation as against a later mortgagee. This is on the principle that a person cannot become his own creditor and thus derogate from his own grant. Moreover when a mortgagor pays off a prior encumbrance created by himself he does nothing but perform his own obligation.

3) ***Subrogation and Co- mortgagor:*** A co- mortgagor can claim subrogation. On redemption he gets subrogated to the place of the mortgage, whom he redeems. Here there is one exception. In the case of simple mortgage, where the mortgagor sells the property subject to the mortgagor and the buyer does not pay the mortgage debt and mortgagee files a suit against the mort-

gagor the personal covenant and obtains a decree, the mortgagor who pays off the decree, can proceed against the buyer by availing himself of subrogation.

Conventional Subrogation—Para (3) : This class of contractual subrogation arises, where a party, advances money to the mortgagor to enable him to his charge the mortgage debt, on the understanding that the third party should be subrogated to the rights of mortgage. So in conventional subrogation, it is the mortgagor and not the person advancing money, who redeems. Thus conventional subrogation is found on the principle of an independent agreement between a borrower and it lender that the lender shall be subrogated to the rights of the mortgagee.

It is necessary to distinguish this para from the para. The difference consists in the person who redeems the Mortgage under both the paragraphs, *Hira Singh. v.Jaisingh* A. I. R. 1937 All 588. Sulaiman C J drew the distinction thus; 'The first paragraph deals with subrogation arising by operation of law and third deals with subrogation *by* agreement. It is necessary that there should be an agreement for subrogation and that agreement should be registered. The basic difference underlying these two paragraphs consists in this, that the first paragraph refers *to a person redeeming the property* and the third paragraph refers to *a person advancing money with which the* mortgage is redeemed".

Lakshmi Amma v. Sankara Natayana Menon **(1935) 59, Mad 359 (F.B.) ;** Here the usufructuary mortgages discharged earlier encumbrances as part of the mortgaged transaction but not the third and claimed subrogation for the first two when third mortgagee brought a suit for sale of the mortgaged property. There is no question of legal subrogetion. He can claim subrogation under para 3. Only when there is a registered instrument for the purpose. This was confirmed in *Jana **Nath v.Premthanath (1940)***. Cal. P.C.

Partial Subrogation :

para 4 The last para lays down as a general rule that there is no partial subrogation in consonance with the rule that the integrity of a mortgage security is indivisible.

But there is one *exception* where a third party and mortgagor *together* redeem the mortgage, the third party can have subrogation only to the extent of his payment in part.

A covenant to exclude subrogation to have that effect must be a covenant to discharge the debt of the every mortgages against whom subrogation is claimed.

CHARGES

Section 100; Defines a charge. It says where immovable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions herein before contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to a charge of a trustee on the trust - property for expenses property incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge".

Charges referred to under this section can be created (1) by the act of parties : and (2) by the operation of law.

1. By act of Parties :

a) No particular form of words is necessary : provided there is an unambiguous intention to create charge. For this reason a bad mortgage cannot create a valid charge. For example, a

mortgage that has to be registered under section 39, if not registered or again if bad for want of attention will not operate as a charge for the intention of the party was not to create a charge but only a mortgage.

b) The property on which the charge is created should be specified, otherwise it will be void for uncertainty.

A charge does not require attestation and because it could be created orally it does not even require registration. But if reduced to writing and if the value is more than Rs. 100-under section 17 of the Registration Act it should be registered.

Illustration:

A inherits certain property from his maternal grand nother. He executes an agreement to pay his sister *B* a fixed annual sum from out of the income of the estate, B has a charge over the estate inherited by A - *Shalamamma v. Suppamma.*

By operation of law, The T.P Act provides for the charge created by operation of law. They are:

(1) Section 55 (4) (b) Unpaid vendor's lien.

(2) Section 55 (6) (b)-Buyer's charge.

(3) Section 55 (5) for - pre-purchase money is binding on transferee irrespective of notice.

Section 73 charge in favour of a mortgagee for surplus said proceeds in a revenue sale- substituted security.

Barring the exception mentioned above charges are not enforceable against transferees for consideration without notice.

EXTINCTION OF MORTGAGES

A mortgage may be *extinguished* in many ways:-

1) Payment of mortgage money.

2) By foreclosure or sale and the sale being confirmed.

3) By release.

4) By merger.

5) By novation. Doctrine of substituted security under section 75.

Merger :

Section 101 says "Any mortgagee of or person having a charge upon, immovable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be without thereby causing the mortgagor or charge to be merged as between himself and any subsequent mortgagee of or person having a subsequent charge upon the same property and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell. Such property without redeeming the prior mortgage or charge, or other- wise than subject thereto'.

Doctrine of Merger:

A security may be extinguished by merger in either of two way: (1) by the merger of a lower security in a higher security or by the merger of a smaller estate in a larger estate. The section deals only with the latter. So where a smaller estate and a larger estate in the same property become united in the same person in the same capacity, as where a charge holder acquired the ownership in the property or the owner acquired the charge on the property the lesser estate become merged and extinguished in the greater estate.

But however where the capacity in which a person in possession of the mortgagee's rights in something is quite different from the capacity in which he is in possession of the equity of redemption, the mere fact that the two capacities are

united in the same person cannot result in a merger and it depends on the intention of the person in whose possession both rights were at the same times This intention may be express or implied. It is implied where it is for his benefit or the person paying to keep alive the charge.

Illustrations: *A mortgagor------ B Ist* Mortgagee

A mortgagor - - -- C 2nd Mortgagee

If the puisne mortgagee C pays off B, the first mortgagee there arises a merger on the one hand and subrogation under section 92 on the other. In order to prevent merger C must prove an intention on the part of the parties i.e. himself and B, to keep alive the first charge. Here the intention can be implied, because it is for his benefit to redeem the first mortgage and also keep it alive.

To take another illustration:

P Mortgagor M — 1st Mortgagee

— 2nd Mortgagee

P is the purchaser of the equity of redemption. He has ownership by purchase from the mortgagor. In case he himself clears the first mortgage, he cannot keep it alive unless there *is* a clear intention on the part of the parties to keep it alive, *Toulmin v. Steere.* is a leading case on merger in English law. In this case the purchaser of the equity of redemption from the mortgagor purchased the first mortgagee's interest with full knowledge of the existence, of the second mortgage. *Held* that if the purchase of the equity of redemption had actual or constructive notice of means encumbrancers when he pays off a charge on the estate, the court will not presume an intention to keep alive the prior charge so that the presumption is in favour of merger.

It must be said here that the scope of *Toulmin v. Steers* is limited to those in which no actual intention is either ex-

pressed or proved by the facts of the case. In other words there is no presumption against merger but an intention to keep the security alive must be actually expressed or implied from the circumstances of the case.

Although *Toulmin v.Steere* was not expressly over-ruled, the later decisions did not follow it as the courts thought the dictum in *Throne V. Cam* had the effect of over-ruling it and therefore refused to follow it — *Liquidation Estates Purchase Co* v. *Willoughby* and *Whitely v Delaney.*

Indian Law:

The Privy Council in *Gokul Das v. Puranmal and Mallireddi Ayyareddi v. Gopal Krishnayya* held that the doctrine of *Tolumin v. Steere* is not applicable to Indian transactions, except as the rule of justice, equity and good conscience. The dictum in *Thorne v. Cam* was applied.

In Bhavani kumar V. Mathuraprased Singh the mortgagee sued upon his mortgagee, and himself purchased the property. After purchase the collector on a decree had it sold for arrears of revenue due by mortgagor, and it was purchased by x, a third party, x sued mortgagee purchaser for recovery of possession. The mortgagee set up his mortgage. It was *held* because the mortgagee himself had purchased the property the mortgage was sunk in the ownership.

In *Devachand v. Chintamani.* x a third party obtained a money decree against the mortgagor. The mortgagor created a charge as security for the money decrees. The first mortgagee brought the property for sale on his MORTGAGE x purchased the property and wanted to execute, the personal decree. It was *held* that there was merger. The effect of the purchase was to extinguish not only the mortgage but also the debt which was the source of the charge.

Old Section 101 :

The present section is the amended section. Under the old section, the general rule was non- merger unless 1) there was a declared intention by express words necessary implication that the charge is to subsist or 2) such continuance would be for his benefit. The new section lays down that the existence of subsequent encumbrance prevents merger. After amendment there is no statutory rule of merger. Circumstances which indicate an intention that the two rights should be kept apart, have to be sought for.

Lesson — 7

LEASE OF IMMOVABLE PROPERTY SECTIONS 105 To 117

Definition of Lease :

Section 105 of the Transfer of Property Act, defines a lease. "A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

The essential elements of a lease are ; (i) the parties; (ii) the subject-matter, immovable property (iii) the demise, of partial transfer, *(iv)* the term, or period and (v) the consideration, or rent.

I) Parties :

The parties are the lessor and the lessee. In Rye V. Rye *(1962)* AC. 496 the House of Lords was called upon to answer the question Whether, a person can grant a lease to himself. It was held that a man could not grant a lease to himself as a lease was an agreement between two persons, one the lessor and the other the lessee. So, in spite of section 5 which enables person to convey property to himself, there cannot be a lease himself as the smaller right will emerge in the larger right of ownership and get extinguished.

Lessor :

Any owner who is competent to contract under section 7, can grant a lease for any term he pleases. Likewise a limited

owner can grant a lease, but only to the extent of the right vested in him. So a lease by a life-tenant will not endure beyond his death. A lessee can also grant lease. Such a lease is called a sublease, or an underlease, but it is still a lease within this section. *Mineral Development Ltd. v.* Union *of India* (1961) I.S.C.R, 455. A lease by joint tenants operates as a lease by each and by all. If one dies the lessee holds the lease under the survivors. Under the Guardian and Wards Act: 1890. Sec. 29 (b) a guardian of the property of a minor can without the permission of the court grant a lease for a term not exceeding five years of ensuring for more than one year after the minor attains majority. Executors or administrators can grant leases under sec. 307 of the Indian Succession Act, 1925.

Lessees :

Lease may be granted to any person who is competent to contract at the date of execution. But where section 7 is concerned although a minor may be a vendee or mortgagee, he cannot be a lessee as the lease is executed both by the lessor and the lessee and also a lease imports a convenient by the minor to pay rent and other reciprocal obligations. So a lease granted to a minor is void.

II. The Subject—Matter

The subject-matter of a lease must be immovable property as defined in section 3. So any kind of immovable, property, tangible or intangible, such as ferries, etc., can be the subject matter of a leases.

III. The Demise or Partial Transfer :

A lease involves the transfer of an interest in immovable property. Such transfer or interest must be for the enjoyment of the immovable property and this includes the possession of the property also. A lease being a transfer of an interest in immovable property, it is a transfer of prop[illegible] ing of section 5. The right of enjoymen[illegible]

under the section is an interest in the property. Therefore unless interest is transferred, it will not amount to a lease. In that case it will amount only to a licence. For the same reason, an agreement to create a lease in future will not amount to a lease since such an agreement will create only a personal right and not an interest in immovable property.

The word "enjoy" in this section must be taken to include *possession* because there is nothing to suggest that the section contemplates the exclusion of possession, when it refers to enjoyment.

IV. The term :

The transfer must be made for a certain time, express or implied or in perpetuity. The commencement of a lease must be certain. In India, leases in perpetuity are perfectly valid. Any letting which is silent as to duration of term, would be void as a lease though it would create a tenancy at will, which could be converted by *payment* of rent into a tenancy from year to year or month to month.

It is the duration of the tenancy which determines the lease hold estate created. Thus depending upon the duration we find there are seven different kinds of leases.

1. Perpetual lease, 2. Tenancy-at-will. 3. Tenancy-at-sufferance 4. Tenancy-by-holding over, 5. Periodic lease, 6. Fixed lease, 7. Lease for life.

1) Perpetual lease or lease in perpetuity ;

In England such a lease is not recognized. Here in India it is created either by an express grant or by a presumed, This kind of tenancy is presumed where there is long possession coupled with payment of rent. Supposing the lease goes on indefinitely and no term is fixed, but on a construction of the lease, there is an intention to confer a hereditary interest. It will be a lease in perpetuity. Section 105 refers to the leases

created by act of parties. So these lease which arise under local usage or act of legislature will not be governed by the provisions of this Act.

An inference of permanency may arise when the tenancy has passed through several successions or the land is held for building purposes. This view was confirmed by the Supreme Court in *Sivayogeswara cotton press v. M. Punchaksharappa. (1962* 3 S. C.R, 876) in which a case for building purposes constructed to be a permanent lease and rights of the lessee were to be heritable. But where a building lease wherein the right of lessee is not heritable, then it cannot be a lease in perpetuity—. *Chapsibhai v. Purushottam* 971) A.S.C.1878.

Where the lessee has stipulated for the right to surrender, whenever he wishes to such a right does not confer any right on the lessor when no such light is reserved so the presumption that it is a lease in perpetuity is there by not weakened, when the land is let out for building purposes without a fixed period.

2) Tenancy-at-will:

English law defines a lease of this kind as: "When a person else to another to hold at will of the lessor or the person letting, the lessee or the person taking the lands is called a tenant at will and as he may be turned out when his landlord please, so he may leave when he likes". Such a tenancy is determinable at the will of either landlord or tenant; and although upon its creation it is expressed to best the will of landlord only or at the will of the tenant only, yet the law implies that it shall be at the will of the other party also: for every lease at will must in law be at the will of the both parties. A tenant- at- will is not entitled to notice to quit when there is permissive occupation.

3) Tenancy at- sufferance :

On determination of a lease, the lessee's right of pos-

session of the property comes to an end. He has not even a personal right of possession not amounting to an interest in the property. Nor is his possession *ipso facto* permissive. In these cases the lessee is not even in the position of a "licensee". His possession is wrongful, so he is known as a tenant by sufferance. From this you should note the expression tenant-by-sufferance does not imply any "existing tenancy". It refers to an ex-tenant continuing. In possession without any right to do so and without any positive permission from the lessor after the determination of his tenancy.

Tenancy- at- sufferance differs from a tenancy at will in the following respects- (1) In the case of a tenancy at- will there is a subsisting tenancy, whereas there is no subsisting tenancy. in tenancy- by- sufferance (II) Tenancy at will arises by implication of law in case of permissive occupation. This one is a fiction to avoid the trespass by a lessee (III) To determine a tenancy it will notice of possession is necessary whereas under tenancy by sufferance no notice is required.

(4) Tenancy-By-Holding Over :

There is distinction between a tenant continuing in possession after the determination of his lease without the consent of the landlord, -and a tenant doing so with - the landlord's consent. The former is tenant-by sufferance where compensation according from day today is paid to the landlord so long as both parties please, the latter is a tenant- holding over.

Section 116 defines a "tenant-holding over;

'If a lessee or under - lessee of property remains in possession there of after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee, or under lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary renewed from year to year, or from month to month according to the purpose for which the

property is le ·ed, as specified in section 106". Illustration: *(1)* A lets a house to B for five years. B underlets the house to C at a monthly rent of Rs. 100. The five years expire, but C continues in possession of the house and pays the rent to A. C's lease is renewed from month to month.

(2) A lets a farm to B for the life of C. C. dies, but. B continues in possession with A's assent. B's lease is renewed from year to year- K. *Ramachandran chettiar v. G. Lakshminarayanaswami chettiar* (1976) II M.L.J. 107.

The act of holding over after the term has expired does not create tenancy of any kind. The common law rule is that he is a tenant on sufferance, if he dose it without the permission of the landlord, and a tenant holding over or a tenant will if he continues with the permission of the landlord. The law is the same in India. *Union of India v.Andhra Bank Ltd. Madras* (1976) II M.L.J. 145.

In Gangs Dult Murarka v. *Kartik Chandra Das and Others.* A.I.R. 1961. S.C. 1067, whore a contractual tenancy to which rent control legislation applies has expired by efflux of time or by determination by notice to quit and the tenant continues in possession of the premises by virtue of statutory protection, it was held that mere acceptance of rent from the tenant by the landlord will not afford ground for holding that the landlord has assented to a new contractual tenancy.

The landlord however can enter into a fresh agreement or the conduct of the parties may be such as to imply, a fresh agreement. It all depends upon the fact of the case. So if at all the landlord cannot oust the lessee in the absence of a fresh contract it is only because of the statutory protection afforded to the lessee by the Rent Control legislation. He is a statutory tenant and not a tenant under the original contract. He is not a tenant holding over within section 116 of the Transfer Property Act.

(5) Periodic Lease :

A lease from year to year or month to month are illustrations of periodic lease. Such a lease is not to be regarded an expiring at the end of each year or month as the casé may be; not is there are - letting at the commencement of each year or each month of tenancy. It is a letting for a period of time which is determinable by due notice.

Section 106 prior to Amending Act of 2002 the read as In the absence of a contract or local law or usage to the contrary, lease of; immovable property for agricultural of manufacturing purpose shall be deemed to be a lease from year to year, terminable on the part of either lessor or lessee by six month's notice expiring with the end of a year of the tenancy; and a lease of immovable for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days notice. After the Amendment Act 2002 The provision of section 106 of the principal Act shall apply to a) all notices in pursuance of which any suit or proceeding is pending at the commencement of this Act b) all notices which have been issued before the commencement of this Act but where no suit or proceeding has been filed before such commencement.

From the foregone it is quite clear that the two essential elements of such leases are (1) the lease must be intended normally, to go on indefinitely, till it is terminated by either the lessor or the lessee; (2) this lease can be terminated only by a notice (a) such a notice for a yearly lease must be 6 months, and (b) in the case of monthly lease must be of 15 days. The notice is to expire within a year or a month as the case may be of the tenancy.

The duration of the term in periodic lesses is continuous from period to period. In *Queen's Club Gardens Estates Ltd. v.Bignel* (1924) I, K.B. 117; Salter. J. said; In the case of all periodic tenancies, whether from year to year, or from quar-

ter to quart-, or from month to month or for any other period, the law, appears to be that the tenancy is from period, from one fixed date to another.

How far is it a heritable right? This question was resolved in *Saheb Bavan v West Patent Press* Co. A.I.R. 1954 Bom. 257. There it was held if the lease is for a definite period and before the period is over the lessee dies, during the reminder of the period, the lessee hold *fight ensures* for the benefit of his heirs, unless the documents clearly stipulates that in case of lessee's death before the expiration of the period, the rights of the lessee are not to ensure for the benefit of his successors. If the lease is for an indefinite period, it does not *ensure* for the benefit of his heir. It is usually for the life time of lessee himself unless again at clearly appears from the contract that the benefit of the lease is intended to acquire to the successor of the lessee. If the lease expressed to be terminable at the option of the lessee, it creates a tenancy at will and such, tenancy is determined at the option of either party to the contract. A tenancy- at will is necessarily determined by the death of the lessee. It can be determined by the lessee creating a lease in favour of another person or by the lessee creating a lease in favour of another person or by the lessee assigning his right to a stranger.

6) Lease for A Fixed Period :

This is a lease where the period is fixed, whether short or long.

7) Lease for Life :

Such a lease is a lease for a certain time, for it terminates With the death of the lessee. Though on the date of the lease the period of such a lease is not certain, it will become certain on the death of the lessee and this is enough for the purpose of requirement as to certainly under section 105.

A lease granted for the life of two persons *ensures* till the death of the survivor of them.

V. **Consideration :**

Section 105 says the consideration for a lease must be, either premium or rent. The Section defines premium as a price paid of promised for the lease, a premium is consideration paid by the lesser for being let into possession of the leased property, whether the amount is paid in one lump sum or in installments, whereas rent will be paid periodically to the lessor.

Lease and Licence :

Sometimes it happens a licence is mistaken for a lease and so it is necessary that we distinguish one from the other. A lease *inter alia* requires two essentials: (1) There must be transfer of the right of possession and not merely the right of use : (2) such right must be an interest in the property.. If merely personal right of possession is granted, such a right will amount only to a licence. Essentially, a licence differs from a lease in both the above points.

(i) A licence need not be a right of possession. It may be any right of user of the property, but it may be a right of possession also.

(ii) A licence is merely a personal right and does not amount to an interest in property. Section 52 of the Easements Act-expressly states so.

(iii) Under section 60. Easements Act a licence can be revoked by the grantor unless : (a) it is coupled with a transfer of property and such transfer is in force ; (b) a licensee acting upon the licence has executed for a work of a permanent character and incur expenses in the execution of that work, whereas a lease is not revocable.

(iv) A licence may be granted without writing or regis-

tration unless it is coupled with a transfer of an interest in immovable property. A lease can only be created by registered instrument, if it is from year to year or for a period exceeding one year or if it reserves a yearly rent; Section 107.

(v) No notice to quite is necessary to determine a licence and to bring a suit for ejectment against the licence. But unless a lease is determined by a due notice to quit or in any other recognized mode, the lessor cannot sue for ejectment against the lessee.

(vi) A lease is transferable rights, whereas a licence is not.

(vii) lease if heritable right while a licence it not.

(viii) A lease is liable to forfeiture in case of denial of landlord's title .... section lll cl. (g) Whereas this principle does not apply to a licence.

Illustrations :

(1) *Venugopala v. Thirunavukkafasu,* A.I.R. 1949 Mad. 148 (D.B.) Here there was an agreement for rent in respect of yield of coconut trees. Defendant was given right to enter upon the land for that purpose.

Held :

(i) Defendant was not a lessee of the garden as such ;

(ii) so far as land was concerned he was only a licence,

(iii) but he was lessee of the right to take toddy.

2) *Arurnugha Vettian v. Angamuthu Nattar* (1965; MLJ. 170 Here the right was to cut and remove coconuts from a grove. In this case, it was held that the right earned for a long period then it is a lease, otherwise a licence,

On the question whether a person who occupies room in a building is a lodger or an occupying tenant, if he is treated

as a lodger he is a licensee, if he is held to be an occupying tenant he is a lessee.

3) The reason why a lodger *is* not a lessee but only a licensee is that he is not entitled to *exclusive occupation.* Though he is enticed to the *exclusive use* of certain rooms, the circumstances of his occupation show that for purposes of daily cleaning of the room enter the room to clear the coinbox of the gasmeter, controlling entry of visitors etc ... the landlord retains control and possession of the property and that the lodger has only the use of the rooms.

4) *M.N. Clubwalav. Fida Hussein Sahib* A.I. R. 1965 S.C, 610. Here appellant owner of Moore Market let stalls on monthly rent. The appellant was sweeping and cleaning etc... the stalls also opening and closing the market at specified hours and the stall holders - had no right to remain behind in the market at nights. The Supreme Court held that "rent" is used loosely for "fee" and the stall-holder is only a licensee and not a lessee.

5) *Timmarayappa v. Narayanappa* A.I.R. 1951.Mys. 89— plaintiff got a right to vend fruit at a bus stand. The deed recited this right as a lease. The question was whether the municipality the grantor can revoke the grant. The question was really - was the right a lease or licence?

Held :

(1) A lease imports that exclusive possession is given to the transferee of the premises conveyed, while a licence on the other hand is permission to do some act which without permission it would be unlawful to do so.

(2) The distinction between a lease and a licence depended upon whether sole and exclusive possession *is* given to the transferee and if no such exclusive possession was gives and if the transferee still retained control over the land and it amount to a licence and not a lease.

(3) Considering all these factors, the right to verid fruits is a bare licence.

From all this it is quite clear that whether an instrument operates as a lease or as a licence is a matter not of words but of substance. The promises belonging to a bank were used for the residence of a manager without obligation to pay anything in return. Held that the manager was a licensee — *Corporation of Calcutta v. Allahabad Bank (1949)* A.C. 105. It should also be noted that if the compensation is on a daily basis the presumption is that it is a licence, as a tenancy from day to day is "an animal which none of us have encountered".

Leases how made :

SECTION 107 explains the modes of creation of leases. "A lease of immovable property from year to year or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other lease of immovable property may bo made either by a registered instrument or by oral agreement accompanied by delivery of possession.

Where a lease of immovable property may by a registered instrument such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee.

Provided that the State Government may, from time to time by notification in the official gazette, direct that leases of immovable property other than leases from year to year or for any term exceeding one year or reserving *a* yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession".

Reserving a yearly rent:

The reservation of a yearly rent creates a presumption that the lease is from year to year : but this presumption can

be rebutted by showing that the other parts of the instrument do not warrant such a presumption.

Oral agreement accompanied by delivery of possession

If possession is given on oral lease for a year is valid; after the first year if he continues as a lessee by holding over under section 116. Such lease being created by operation of law valid even though the provisions section 107 have not been complied with.

Consequences of non-registration:

If a lease has to be registered then an unregistered deed is void- Ariff v. Jagunath. But such a lease dead can be used for a collateral purpose to protect his possession where possession has already been delivered to the lessee.

By both the lessor and lessee:

The third para of Sec. 107 was inserted by the Amending Act of 1929. Now both the parties must execute the deed for it contains covenants by both. But even after the amendment where the deed was executed by the lessee and accepted by the lessor was considered as a lease, in the case of *Mamndrunathn v. Panchan Mandal* (1951) 2 Cat. 444.

Rights and liabilities lessor and lessee:

SECTION 108 ; enumerates all the rights and liabilities of the lessor and lessee. In the absence of a contract or local usage to the contrary the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following or such of them as are applicable to the property.

A—Rights and liabilities of the Lessor:

a) The lessor is bound to disclose to the lessee any material defect in the property with reference of its intended

use of which t' former is and the latter is not aware and which the latter could not with ordinary care discover:

b) the lessor is bound on the lessee's request to put him in: possession of the property :

c) the lessor shall be deemed *to* contract with the lessee that of the latter pays the rent reserved by the lease and perform the contract binding *on* the lessee, he may hold the property during the time limited by the lease without interruption.

The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

B - Rights and Liabilities of the Lessees.

d) If during the continuance of the lease, any accession is made to the property, such accession (subject to the law relating to alluvion for the time being in force.) shall be deemed to be comprised in the lease.

e) If by fire, tempest or flood, violence of an army or of a mob or other irresistible force, any .material part of the property be wholly destroyed or rendered substantially and permanently unite for the purpose for which it was let, the lease shall, at the option of the lessee, be void.

Provided that, if the injury be occasioned by the wrongful act or default of the lessee he shall not be entitled to avail himself of the benefit of this provision;

f) If the lessor neglects to make, within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the ren or otherwise recover it from the lessor;

g) if the lessor neglects to make any payment which he is bound to make and which. If not made by him is recoverable from the lessee or against the property, the lessee may make such payment himself and deduct it with interest from the rent, or otherwise recover it from the lessor;

h) The lessee may even after the determination of lease remove at any time whilst he is in possession of the property leased, but not afterwards, all things which he has attached to the earth provided he leaves the property in the state in which he received it.

i) When a lease of uncertain duration determines by any means except the fault of the lessee, he or his legal representatives entitled to all the crops planted or sown by the lessee and growing upon the property when the lease determines, and to free ingress and egress to gather and carry them.

j) The lease may transfer absolutely or by way of mortgage or sublease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. The lessee shall not by reason only of such transfer *cease* to be subject to any of the liabilities attaching to the lease.

Nothing in this clause shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.

k) the lessee is bound to disclose lo the lessor any fact as to the nature or extent of the interest which the lessee is about to take of which the lessee is, and the lessor is not aware, and which materially increase the value of such interest.

l) the lessee is bound to pay or tender, at the proper time and place the premium or rent *to* the lessor or his agent in this behalf.

m) the lessee is bound to keep, and on the termination of the lease, to restore the property in as, good condition as it was at the time when he was put in possession, subject only to the changes caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term to enter upon the property and inspect the condition there of and give or leave notice of any defect in such condition; and when such defect has been caused by any act or default on the part the lessee, his servants, or agents, he is bound to make it good within three months after such notice has been given or left.

n) If the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon of any interference with the lessor's rights concerning such property he is bound to given, with reasonable diligence, notice thereof to-the lessor.

o) the lessee may use the property and its products (if any) as a person of ordinary prudence would use them if they were his own but he must not use, or permit another to use the property for a purpose other than that for which it was leased, or fell or sell timber, pull down or damaged buildings belonging to the lessor, of work mines quarries not open when the lease was granted, or commit any other act which is destructive or permanently injurious thereto.

p) he must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purpose.

q) on the determination of the lease the lessee is bound to Put the lessor into possession of the property.

RIGHTS AND LIABILITIES Of LESSOR

Here I propose to discuss only the complicated rights and liabilities of both the lessor and lessee. Where the other rights and liabilities are concerned you can look to the section itself

Sections (108) cl, (a) :

Disclosure of material defects. This clause corresponds to section 55(l)/a). The same distinction between latent and patent defects as they are in sec 55(1) (a) is maintained hare. The lossor is bound to disclose only latent defects which must have reference to *its intended use.* The defect only as to nature and condition of the property and not as to title.

Section (108) cl. (b);

To give possession. This is a statutory obligation. If possession is not delivered by the; lessor, the lessee can sue him for damages for breach of obligation or he can sue for possession of the property leased. What amounts to delivery of possession depends upon each case. When property leased is rent payable by tenants delivery of possession by attornment is enough.

Section (108) cl, *(c)*:

Covenant for quiet enjoyment. Under English law it is always implied. This covenant under both English and Indian laws do not extend to the tortious acts of third parties. In such cases the remedy of the lessee is to sue the trespasser.

Rights and liabilities of lesser Section 108 cl. (e) :

Duties of the lessee is to pay rent in English law this liability to pay rent is present, ever if the property is destroyed but under this clause, it is open to the lessor to put an end to, the lease.

Section 108 cl (q) :

He must deliver possession of the leased property on determination of the lease. Under section 108 (g) on trespass he must give information.

Rights of the lessee :

He is entitled to possession as already seen.

Section 108 cl. (I) :

He has a right to emblements, growing crop though no included in the definition of immovable property under section 3, it is an incident of immovable property. Supposing the lessee has grown crops he has a right to gather those crops and he can have *free ingress and egress* for the purpose. This right is available to all classes to tenants except the tenancy for a fixed period.

Section 108 cl. (h):

This sub-section deals with fixtures in law. A fixture means, any chattel fixed to the soil or land in English law, everything fixed permanently to the earth becomes part of the land and would automatically belong to the owner of the soil irrespective of the person who fixed it. The injustice of this ancient rule was recognised. Subsequently certain statutes have also been passed to enable tenant to remove certain fixtures.

English law classifies fixtures into three kinds, viz. Trade fixtures which means, those fixtures put up by the tenant on the land to enable him to carry on his trade or business; ornamental and domestic fixtures i.e. things which have been fixed to a house for decorative purposes; and Agricultural fixtures e.g a cattle shed.

Even before the enactment of *the* Transfer of Property Act, it was held that the English law relating to fixtures does not apply to India.

Under Indian law any kind of fixtures may be created on the property by the tenant without causing injury to the land sub sec (h) of sec. 108 gives the tenant the right *to* remove such fixtures on the termination of the tenancy. In other words the lessee may remove anything he has attached before he gives up possession, even if the lease has expired but

Section 108 CL. (j)

(1) right to assignments- A leasehold interest is property and it is alienable in the absence of a covenant to contrary. A covenant against alienation is enforceable. Its breach involves the forfeiture of the lease if the lessor is given the right of re-entry on such breach. An assignment in breach of it is voidable at the instance of the lessor. If the right of re-entry is not reserved then the remedy is damages. Sub-letting *is* not a breach.

Now under this heading what we have to study is supposing the lessee sells his lease-hold interest, how far is the purchaser bound by the agreements between the lessor and lessee? In other words to what extent is an assignee of a lessee bound by the original covenant between the original lessor and lessee?

RIGHTS AND LIABILITIES ARISING ON AN ASSIGNMENT OF THE LEASE-HOLD INTEREST

A mere assignment of a lesse does not release the lessee from his liability under a personal covenant to pay rent even if notice is given to the landlord. There must be actual substitution of the assignee as the person liable on the personal covenant. if the lessor accepts rent from the assignee then privity *of* contract is created between the lessor and the assignee. Then he ceases to be liable *Nahakumari v Behaii Lal.* The assigns also liable to the lessor in respect of all convenants running with the land and since a covenant to pay rent is a covenant running with the land, it follows that he assignee is directly liable to the lessor for the payment of rent.

The Covenants may be either:

(i) AFFIRMATIVE i.e. .to enjoy the property in a particular manner. e.g. to dig a well ; or to build a bridge.

(ii) NEGATIVE i.e. not to enjoy the property in a particular manner e.g. not to open a fish shop or not to build a house within an area of 20 feet.

The distinction between the negative and the affirmative covenant should be ascertained not by looking to the form but by looking at the substance of the covenant e.g. a covenant to put up a building and to use it only for residential purposes, may appear at first sight as a positive or affirmative covenant, but it is really a negative covenant for the mode of enjoyment is restricted for the use of residence alone. But both kinds run with the land and binding on the assignee, whether he enters into possession or not so long as in the latter case, possessory title has passed and the *whole* of the lessee's interest is assigned over, and not a subsidiary interest as in a mortgage by lessee or sub- letting.

Again these convenants may either (i) touch or (ii) concern the immovable property. A covenant is said to *touch of concern the lands* if the agreement affect the, nature, the value or the quality of the land e g. not to build a two storeyed building will be such a covenant.

As far as leases are concerned, all these covenants i.e., affirmative or negative or those which touch of concern the land become enforceable because of (1) *Privity of estate* and (2) *Privity of Contract.*

The Liabilities may be illustrated as here under :

Lessor

Lessees
Liable to lessor by privity of contract and privity of estate → ABSOLUTE ASSIGNS
Liable to lessor by privity of estate

SUB-LESSEE AND MORTGAGEE

Not liable to lessor as there is no privity of estate or of contract.

Under doctrine of privity of estate an absolute assignee is liable to the lessor by privity of estate for rent and all covenants running with the land and all covenants which touch or concern the land or those which affect the nature and quality of the land are of this nature. Covenants to repair, not to assign to pay taxes, and rents by lessor not to build on his adjoining land in front of the building lines, quiet enjoyment are all covenants that run with the land.

Where the Burden of the Lessee's Covenants Runs with the Land :

Rule in *Spencer's Case.* Spencer leased Spencer leased a house to S for 21 years and S covenanted for "himself his executors and administrators to build a brick wall" S assigned the lease to J and J in turn assigned it to Clark. Spencer sued Clark for breach of the covenant.

Held :

Since S had not covenanted for himself and his assigns, Clark was not liable. The following principles were laid down ;

(i) where the covenant relates to a thing in "case" (in existance) and directly concerns the land it binds the assigns whether named or not.

(ii) when it resales to a thing in future (as in the instant case of building a brick wall) and directly concerns the land it binds he assigns if they are named but not otherwise.

(iii) where the covenant does not touch or concern the land and is merely collateral it does not bind the assigns, but it is a personal covenant only, hence it does not run with the land.

The La' of Real property Act, 1925, by Section 70 cl. (i) abolished the above second principle. The present law is, assigns are bound whether they are named or not.

Collateral or Personal Covenants :

Such covenants are those which affect land other than that demised or affect the covenantor personally. These do not run with the land and cannot be enforced against assigns, for example :

a) A leases a house to B who covenants to pay the rents and taxes of another house of A. B assigns the lease to C.A. *cannot enforce the convenant against C. Gower v. Postmaster General* (1887) , L.T. 527.

b) A leases a public house to B and B covenants not in build or keep any house for the sale of liquor within half a mile of the demised premises. B assigns the lease to C.A cannot enforce the covenant against C: *Thomas v-Hayward (1869) L.R. 4 Exch 311.*

Collateral covenants in equity could be enforced if they were restrictive in nature. This is on the principle that "'a party shall not be permitted to use the land in a manner inconsistent with the contract, entered into by his vendor, with notice at the time of purchase". We have the classical case of *Tulk v. Moxhay* a covenant imposed for the benefit of the land retained by the transferor or grantor was binding on the transferee or grantee. In other words a covenant restricting user of land runs with the land in equity.

In *Austerberry v. Corporation of Oldham* (1885)29 Ch,C750 the owner had conveyed a site of land adjoining his own to trustees who had convenanted to maintain and repair a road on it. The owner sold his adjacent land to the plaintiff, and the trustees sold the road site to the defendants. It was held the plaintiff could not enforce the covenant against defendants.

But leases from exception to this rule. All covenants which touch or concern the land whether affirmative or negative can be enforced against assigns; Collateral under equity if they are restrictive only.

In *Ram Kinker v. Satya Charan* A.I.R. 1939 F.C. 14 it was held that where there is privity of estate all the covenants that touch and concern the land can be enforced by the lessor against the lessee.

It should also be noted that the *benefits of lessee's covenants* run with the reversion. If reversion is secured the Advantage is allotted to every part thereof.

The *burden of lessors covenants* run with this land in favour of the lessee's assigns such as to put in possession and quite enjoyment.

Assignment by the Lessor of the Right of Reversion:

Section 109 deals with the right of lessor's transferee. It says. If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it but the lessor shall not by reason only of such transfer cease to be subject to say of the liabilities imposed upon him by lease unless the lessee elects to treat the transferee as the person liable to him.

Provided that the transferee is not entitled to arrears to rent due before the transfer, and that, if the lessee not having reason to believe that such transfer has been made, pays rent to the lessor the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is

payable in resp ct of the part so transferred, and in case they disagree, such determination may be made by any court having jurisdiction to entertain a suit for the possession of the property leased".

Assignment of reversion arises in three ways :

Para:

(i) An absolute assignment; (ii) An assignment of' the reversion in a portion of the property; (iii) An assignment part of the reversion. In the first case there is no Severance of the right of reversion, whereas in the latter two cases there is a severance of the reversion.

Severance of Reversion :

(ii) Assignment of part of the property : Illustration : A leases to B 10 acres of land. A transfers 5 acres to C. In this case there; is assignments of the part of the property. C can receive rents for 5 acres from B. likewise A. original lessor can recover rent for the other 5 acres from B.

(iii) Assignment of a portion of reversion ; A leases his property to B for 5 years. A assigns his right to C for the first 2 years. There is an assignment of a portion of reversion. Therefore C can receive the rent for the first 2 years, because he has the reversionary right for these two years.

The latter portion of the first para which lays down that the lessor shall not, by reason of transfer of his interest, cease to be subject to the liabilities unless the lessee elects to treat the transferee as his landlord, is an Illustration of the equitable principle that "a man cannot assign obligations, without the consent or the authority of these to whom the duties are owing".

The purchaser of the rights of the lessor has all the rights of the lessor under the lease unless there is a contract to the contrary. The assignee is also subject to all the Utilities of the

lessor. Thus a covenant to renew a lease is a covenant which runs with the land and which according to this section creates a liability enforceable against the lessor's transferee- Ramasami v. Chinnan.

But not personal covenant, such as paying a lump sum of money on the termination of the lease, Such an agreement cannot he enforced against the assignee of the lessor.

in spite of the fact. that the lessor has assigned has rights the lessor continues to be liable to the lessee. Under that case an option is vested in the lessee either to hold the lessor liable of the assignee., but never both. Election is final, Illustration : The lessee pays the corporation taxes, he sues the assignee. Having sued the assignee he cannot proceed against the lessor also.

The words "so long as he is the owner of it"—means the liability of the lessor's assignee lasts so long as his estate lasts. This is because of privity of eatate Notice of transfer has to be given of the lessee.

Para 2 deals with Rights of Assignee :

It is only from the date of assignment he can claim rights therefore he has no right to arrears of rent prior to the assignment. Nor is he entitled to rents accruing due after the transfer. if the lessee had, without notice of the transfer already paid such rent to the original lessor. From this it is quite clear that lessee is liable for rent to the transferee or assignee of lessor only after notice of assignment.

Under English law the arrears of rent does not run with the reversion and English law regards them as choses-in-action. If by a separate contract, the arrears is assigned by the lessor, his assignee can get a decree for the arrears of rent from the lessee.

Para 3 :

An assignee of a part of the reversionary right is, it competent to eject the tenant from that portion during the period of tenancy.

Determination of Lease :

Section III details the different ways in which a lease can and is determined : "A lease of immovable property determines.

a) by efflux of the time limited thereby ;

b) where such time is limited conditionally on the happening of some even-by the happening of such event;

c) where the interest of the lessor in the property terminates on, or his power the dispose of the same extends only to the happening of any event, by the happening of such event.

d) in case the interest of the lessee and the lessor in the whole of the property becomes vested at the same time in one person in the same right.

e) by express surrender that is to say in case the lessee yields up his interest under the lease to the lessor by mutual agreement between them.

f) by implied surrender :

g) by forfeiture that is to say:- (1) in case the losses breaks an express condition which provides that on breach thereof, the lessor may re-enter or (2) in case the lessees *renounces* his character as such by setting up a title in a third person or by claiming title on himself or (3) the lessee adjudicated as insolvent and the lease provides that the lessor may re-enter on the happening of such event and in any of the *case* the lessor or his transferee

gives notice in writing to the lessee of his intention to determine the lease.

h) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duty given by one party to the other" — illustration to clause (1) appended to the section is — A lessee accept from his lessor a new lease of the property leaded, to take affect— during the continuance of the existing lease. This is an implied surrender of the former lease and such lease determines thereupon.

The principles upon which a lease is determined have to be applied by the court to agricultural leases also.

Clause (A) Efflux of Time :

Leases for definite period fixed leases come to an end on the last day of the term. The lessor may enter upon the land without 'notice. But there is a covenant, for renewal the lessee may claim enforcement of such covenant, But in order to be enforceable such a covenant must he defines as to the terms upon which the renewal to be granted.

Clause (B) Term Limited Conditionally:

Where a lease is granted for lifetime of a lessee it is determined by the death of the lessee. A lease granted for a definite period e.g. holding of an exhibition will come under this clause.

Glause (C) Termination of Lessor.'s Interest or Power;

No person can grant to another a larger interest in property than he himself possesses. If the lessor hold the property for his own life or for life of another the lessor would terminate on the death of himself or that other person. Such a lease is however, voidable and not void on the grantor's death it being a heritable right.

It also follows where the interest of the lesson in the property terminate or his power to dispose or the same extends only to the happening of any event, the lease will terminate on such happening e.g. where a mortgage grants a lease the lease will terminate on redemption of the mortgage.

Being a heritable right mere death of lessee or losses will put an end to the lease unless it is stated otherwise.

Clause (D) Merger :

Where the lessee himself purchases the leasehold property the leasehold interest merges in the ownership (See Section 10 on Merger) The entire interest of the lessee and the entire interest of the lessor must *vest* in the same person..

Clause (E) Surrender:

This clause applies only to lease which can be surrendered. If there is a covenant prohibiting surrender, this clause does not apply. Surrender consists in the yielding up of the term by the lessee to the lessor accompanied by the delivery of possession and the accompanies of the same by the lessor. A relinguishment by a tenant without surrender of possession in ineffective. There can be no valid surrender unless surrender takes place by mutual agreement between the lessor and the lessee. The surrender must be made only to the lessor. Where there are more than one lessor then it must be made to all of them. This surrender is express.

Clause (F) implied surrender :

This is surrender by operation of law and arises in two ways (1) by creation of new relationships, between the lessor and the lessee and (2) by relinquishment of possession.

The first one arises by acceptance of a new lease in the place of another during its continuance. This operates as *surrender in* law of the old lease. However, it should be noted, the

subsequent grant of mining lease to a lessee who hold a prior lease for coffee cultivation over the same area does not necessarily imply a surrender of the prior lease.

The second one arises where the lessee relinquished possession. This must fulfil two conditions (i) giving up possession by the lessee ii) taking up possession by lessor.

Clause (g) forfeiture :

Forfeiture means loss of some legal right by reason of breach of some obligation. Under this clause there is forfeiture in 3 cases.

(i) breach of an express condition, where a right of re- entry is Provided for on such breach. A refusal by a tenant to perform services which are incidental to his holding is sufficient of itself to found a suit for ejectment. Where there is no provision for re-entry by the lessor, the only relief is damages for breach of covenants etc.

ii) denial of lessor's title.

iii) insolvency of the lessee, where the lease provides, on such contingency for a right of re-entry.

Under the first and third cases, there can be no forfeiture unless a right of re-entry is provided for. This qualification is not necessary in the second case.

In all the three cases, the right of forfeiture can be exercised by landlord, only if he gives notice to the lessee of his intention to do so.

The general rule is that "the law abhors forfeiture" Therefore the plaintiff landlord reling no forfeiture must prove his right strictly. A lease cannot be determined in part by forfeiture. In AIR. 1926 Mad 1202 *David Cutinha v- Salvadora Minazes* it was observed. "It is an axiom of law that a forfeiture clause should be strictly construed"..

(ii) Denial of lessor's title :

Estoppel: tenant deny his landlord's title during the continuance of the lease. Section 116. of the Indian Evidence Act lays down the rule regarding estoppel, it provides that because the lessee derives his right from the landlord he is estopped from denying the title of the landlord however defective it might be. An assertion that 'the title is in himself or a third party is enough.

A forfeiture under clause (g) can be waived if the landlord accepts rent or if he manifests an Intention to waive the forfeiture.

Section 112 :

Provides for waiver, provided that the lessor is aware that the forfeiture has been incurred. Provided also that where rent is accepted after the institution of a suit to eject the lessee on the ground of forfeiture, such *acceptance* is not waiver.

Section 114 :

Where the lease has been determined by forfeiture and the lessor sues to eject the lessee, if the lessee thereafter tenders the rent it is open to the court to the pass an order relieving him of the burden of forfeiture.

iii) Insolvency of the Lessee :

This ground of forfeiture was added by the Amendment of 1929. Under para 2 of section 12 such a condition that on the insolvency of the lessee, leases shall expire is a valied condition.

Clause (H) Notice to Quit:

Periodic tenancies are determined by notice to quit section 106 (yearly lease — 6 months notice monthly lease - 15 days notice). In the case of fixed leases, no notices is necessary as these lease come to an end automatically on the expiry of the period fixed.

Such notice to quit can be waived under section 113 either by express or implied consent. It is implied when the lessor by his act shows on intention to treat the lease as subsisting.

There are two conditions for a valid notice of termination namely (1) the notice should be the proper length of time. A monthly lease requires fifteen day's notice expiring with the end of a month of the lease. A yearly tenancy requires six months notice ending at the end of the tenancy. (2) *It* should terminate the tenancy lease at the end of the year or *month of* the tenancy, as the case may be.

Benoy Krishna Das v. Salsiccioni is an Illustrative case on this point. In this case lease not being agricultural of manufacturing purpose for four years commenced on 1st June, 192l, According to sec. 110 T.P. Act, that day should be excluded in calculating tne duration of the lease. The lease, therefore, comes to an end at midnight of 1st June, 1925. However, the tenant remained in possession as tenant by holding over. Thus the tenant became a monthly tenant. Since this tenancy commenced on 2nd June 1925, one period of this lease comes to end on the 1st day of every succeeding months, The tenant gave notice to landlord on Ist February 1928 Informing his intentions to vacate the premises by Ist March 1928.

The Privy Council held that the notice was valid since is ended with the end of one period of the tenancy and also it was notice of proper length of time.

Lesson - 8

LAW OF EXCHANGES - SECTIONS 118 to 121

Definition Exchange:

Section 118 "When two persons mutually transfer the ownership of one thing for the ownership of another neither thing or both things being money only, the transaction is called an "exchange".

... A transfer of property in completion of an exchange can he made only in manner provided for the transfer of each property by sale".

Illustration :

A transferred to B a house worth Rs 1,500 and B transferred to A a field worth Rs.1000 and Rs. 500 in each the transaction is an exchange and therefore not to subject to pre-emption as sale - I *small Shah v. Sabh v. Sabh Muhammad* (1925) 861 C. 266.

The definition is not limited to immovable property alone includes both movables and immovables. In exchange there is no price.

Mode of Transfer :

An exchange of immovable property of Rs. 100 or upwards is can only be effected by means of a registered instrument. The non registration of the deed of exchange will be cured by the doctrine of part-performance under section 53A, of the transfer of property Act if the parties have taken possession. In the case of immovable property the exchange is made by mutual, conveyances. There need not be two separate documents. The ownership of one party must be exclusive of the ownership of the other so that a partition is *not* an exchange.

Section 119 deals with the right of a party deprived of thing received in exchange, "If any party to an exchange or any person claiming through or under such party is by reason of any defect on the title of the other party deprived of thing or any part of thing received by him in exchange, the unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss, caused thereby, or an option of the person so deprived, for the return of the thing transferred. It still in the possession of such other party or his legal representative or a transferor from him without consideration.

There is an amended Section under which the return of the thing is, limited to cases where the thing is still in the possession of the other party of his legal representative. Section 119 implies that there is an implied convenient for title as in a sale under section 55 (2) and section 14 of the Indian sale of Goods Act. The party aggrieved may either rescind the contract or claim compensation. The right may be exercised by a person claiming under the party aggrieved. But the right of re-entry cannot be exercised, if the land is in the possession of a transferee for consideration.

There is of course no right to the return of land, if there has been no exchange. There cannot be a triangular exchange.

Section 120 deals with the rights and liabilities of parties. Save as otherwise provided in this chapter, each party has rignts and is subject to the liabilities of a seller as to that which he gives and has the rights and is subject to the liabilities of a buyer as to that which he takes. So section 5 of this Act applies to immovables and rules of the sale of Goods Act to movables.

In exchange, each party is in the position of a seller as well as buyer. In respect of the property he transfers, he is in the position of a seller and in respect of the property he takes, he is in the position of a buyer.

Section 121 deals with exchange of money 'on an exchange of money each party thereby warrants the genuineness of the money given by him. Money here includes not only coins but also currency notes. Here there is no warranty of title as the title of money passes by mere delivery to one who receives it honestly. There is however and implied warranty as to the genuineness of the money. Forged bank notes. Worthless cheques and stolen goods would be in total failure of consideration.

GIFTS

Gifts Definition :

Section 122; 'Gift' is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person called the donor, to another, called the donee and accepted by or on behalf of the donee".

Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void".

Under this heading we deal only with gifts inter vivos and only of tangible property whether movables or immovables, but the subject of the gift must be actually in existence at the time of the gift. A donation cannot be made of anything to be produced in future.

The essentials of a gift are i) the absence of consideration ii) the donor; (iii) the donee : iv) the subject - matter v) the transfer vi) the acceptance.

In Halsbury's Laws of England (vo.p. 15., 339) a gift is described as : It is an act whereby anything is voluntarily transferred from the true possessor to any person, with the full intention that the thing shall not return to the donor and with full intention on the part of the receiver to retain the thing entirely as his, without restoring it to the giver".

i) Voluntarily and without consideration :

The word voluntarily is used to mean by the unfettered will of the donor.-That is transfer should be without consideration is the essential characteristic of a gift. Blackstone says "Gifts are always gtatuitous, grants are upon some consideration or equivalent."

The donor parts with the property without any consideration i.e. it is a gratuitous transfer of property from one person to another.

ii) The donor :

Prima facie every person make a valid gift. Under section 7 it is only a person competent to contract, who can transfer the property. Therefore a minor, being incompetent to transfer, cannot make a valid gift. Person in a fiduciary capacity e.g., trustee cannot make a valid gift of trust property unless they are authorised to do so.

iii) The donee :

He is the person who receives the gift. The section reads accepted by or on behalf of the donee". Therefore, it is not necessary that the donee himself should accept it. It may be accepted on his behalf by some one else other than donee. e.g. guardian. All that the action requires is, that the donee must be ascertained or be an ascertainable person, so the public cannot be a donee. A gift to dharma is not valid, as the word is too vague and indefinite for the court to enforce the gift.

The donee must be alive at the date of the gift and the representatives of a person deceased at the date of the gift cannot take for him. The word "person" includes "persons" to a gift can therefore be made to two or more persons, who take it either as joint tenants or tenants-in common as the case may be. When the gift is made to a class, some of whom are not in istence at the date of the gift or some accept and not oth-

ers, then it ensures to the benefit to such of them as are capable of taking or have accepted to take. Where some have not accepted the gift it is void as to the share which they would have taken— section 125.

Dedication to a Hindu deity is not a gift. It would be endowment if the owner has divested himself of his right of ownership in favour of the deity. As the Deity is not a "livin person" under the Act, section 123 does not apply. The dedication can be by an unregistered deed or even orally-- Ram Kumar Ram Ghandra & Co, v. Commissioner of I.T., U.P.A.I.R 1966 All. 100.

(iv) Subject matter :

The subject matter should be certain either movable or immovable property, and the same must be transferable under section 6. But it cannot be future property. An actionable claim is an existing property and can be validity gift. A gift of a mortgage is a gift of immovable property also.

(v) Transfer :

Section 123 lays down the modes in which gifts could be made. i) Immovable property :

Irrespective of value only by (a) registered instrument (b) signed by or on behalf of the donor and (c) attested by at least two witnesses.

ii) Movable property : either by (a) registered instrument or b) delivery of property.

Immovable property :

The mere fact that a, deed of gift is registered does not render the gift complete in the absence of acceptance by the donee. Consequently, the donor can revoke, the gift , before acceptance.

So the question arises, when does a gift become complete. Does it become complete after, the acceptance by the donee? or does it become, complete only on (registration? In other words inspite of the acceptance by the donee, is it suspended, until registration?

Different points of view :

One view is that the gift, is complete until registration. So it can be revoked before registration. Another view is the donor could not be 'compelled to register a deed against his wishes, an such a 'gift even if registered is valid. The leading case on the point has' not resolved the conflict, *Kalyana Sundaram v. Karuppa Moopanar* A.I.R 1927 P.C. 42. In this case A, a Hindu made gift of certain ancestral immovable property to B on 9-9-1891 and delivered it to B. On 10-9-1891 A adopted C, A few days after adoption the deed was registered C contended that the gift was, invalid as the same was not registered until after his adoption. In other words C contended that the ancestral property could not be gifted away without his consent and since the same was registered after his 'adoption he could question its competence, as it became it effective only on registration held : (1) Registration is a necessary solemnity for the enforcement of a gift of immovable property it does not suspend for the gift until registration, actually takes place (2) When the instrument of gift has been handed by the donor to the donee and accepted by him the former has done everything in his power to complete the donation and to make in effective (3) So the gift is valid.

This Privy Council ruling was relied on in A.I.R. 954 Mad. 215 Venakata *Subbamma V. Narayanaswamy*. In this case it was held if there acceptance before the execution even though the registration was postponed to a later date, the gift would become irrevocable.

The effe of an unregistered gift deed :

If a deed of gift of immovable property is not registered, the gift cannot be supported under the doctrine of part-performance.

In Varada Pillai v. Jeevarathinammal A.I.R. 1911 O.C. 44. Where under unregistered gift deed possession was delivered to the donee it was held the donee in possession can prescribe for herself a good title by adverse possession for 12 years and over. That does not mean that by adverse possession the gift is perfected for an imperfect and defective deed can never pass the title.

In Made Gouda v. Chenna Gouda :

1925 : 49 Mad. L.J. 150 members of a coparcenary effected a partition and gave one share to a stranger. As partition deed was not registered there was to gift.

vi) Acceptance (by or on behalf of the donee) :

Acceptance is an essential element both under English law and under, this Act. Under English law this acceptance by the donee is presumed, until he expresses his dissent. Under Indian law there must be an actual acceptance. But it is not necessary the same should be expressed. It may even be implied.

This acceptance must be during the life time of the donor and while he is still capable of giving. If he dies or ceases to be capable of giving before acceptance, the gift become void. But the registration may be made even after his death This acceptance may be made either by donor himself or on his behalf. It the deed as registered against the wishes of the donor the gift does not fail.

According to section 124 a gift of existing and future property is void as to the latter.

REVOCATION OF GIFT—SECTION 126

Section 126 :

The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked: but a gift which the parties agree shall be revocable wholly or in part, all the mere will of the donor, is void wholly or in part, the case may be.

A gift may also be revoked in any of the CASES (save want or failure of consideration) in which, if it were a contract, it might be descinded :

Save as aforesaid, a gift cannot be revoked.

Nothing contained in this section shall be deemed to affect the rights of transferees for consideration without notice".

Illustrations :

a) A gives a field to B reserving to 'himself with B's assent the right to take back the field in case B and his desendants die before A, B dies without desendants in A's lifetime. A may take back the field,

b) A gives a lakh of rupees to B, reserving to himself with B's assent the right to take back at pleasure. Rs. 10,000 out of the lakh. The gift holds good as to Rs. 90,000 but is void as to Rs. 10,000 which continues to bring to A.

Under the first Para :

A gift cannot be revoked after acceptance of the mere will of the donor. It can be revoked only by mutual agreement. Therefore it requires the following two things (1) a valid agreement under the law of contract, and 2) the event, on the happening of which the gift is suspended must not depend on the will of the donor.

Where the gift is revocable wholly or in part at the mere will of the donor the gift is void wholly or in part as the case may be. The reason is that where a party declares his intention to make a gift and then annexes a condition to the declaration that he will revoke it the declaration of the gift is contradiction in itself and there is no gift at all.

Once the deed of gift is handed over to the donee duly respected and attested and accepted it is irrevocable even if unregistered.

Para 2 :

Essentially a gift is a contract. A contract may be rescinded, Where it is voidable under the provisions of the Indian Contract Act by virtue of this para of section 16 a gift can also he rescinded on the ground of the following sections of the Indian Contract Act. Thus a gift be revoked on the gourd of

1. Coercion (Section 15)
2. Undue influence (Section 16)
3. Misrepresentation (Section 18)
4. Fraud (Section 17)
5. Mistake (Section 20 21 and 22)

In Alcard V. Skinner (1887) 36Ch. 145. it has been held that the right to have a gift set aside for fraud or under influence does not cease on the death of donor; but passes to his legal representatives and executors. Revocation of gift must be expess and unequivocal.

Para 3 :

This section is exhanstive and therefore this section should be complied with strictly. Except in the circumstances mentioned already a completed gift is irrevocable.

ONEROUS GIFT

Section 127 :

"Whether the gift is in the form of a single transfer the same person of several things of which one is and it others are not, burdened by an obligation the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and Independent transfers to the same person of several things the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the latter onerous.

A donee not competent to contract and accepting property burdened by any obligation is, not bound by his acceptance. But if after becoming competent to contract and being aware of the, obligation, he retains the property given, he becomes so bound".

Illustration :

a) A has shares in x, a prosperous joint-stock company, and also shares in y, a joint-stock company in difficulties. Heavey calls are expected in respect of the shares in y. A gives B all his shares in both the companies B refuses to accept the shares in y. He cannot take the shares in x.

b) A having a lease for a term of years of, a house at rent which he and his representatives are bound to, pay during the term and with is more than the house can be let, gives to B the lease, and also as a separate and independent transaction, sum of money. B refuses to accept the lease. He does not by his refusal forfeit the money.

This section, is based on the same principles of the doctrine of election in section 35.

Para 1 :

Where a gift in the form of a single, transfer to the same person of several things one is, and the others are not, burdened by an obligation *Prima face* the intention of the donor is the gift shall go as a whole and this intention must be given effect to by the donee. The first para accordingly provides that in such cases, the donee can take nothing unless he accepts it fully.

Para 2 :

Where a gift is in the form of two or more separate independent transfers, it cannot be presumed that the donor intended that the gift to go as a whole. In such a case, the donee can accept one and refuse the other.

Para 3 :

Under Section 7 a person incompetent to contract can-not transfer the property but can be transferee of property. It is laid down under this para that even a gift subject to a burden can be accepted by a person incompetent to a contract, without the intervention of the guardian. In such a case, he can on attaining majority either accept or refuse the onerous gift. But where he accepts it he will have to fulfil the obligation.

UNIVERSAL DONEE— SECTION 128

"Subject to the provisions of section 127, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by and liabilities of the donor at the time of the gift to the extend of the property comprised therein

A universal succession takes place when the sum total of a man's rights and liabilities, called in Roman law *Universitatis turis* is transfered to another.

Under English law universal succession is recognised to there cases; i) death ii) bankruptcy, or iii) confiscation of the

estate by the State. In all there cases it is brought by the operation of law. Under English law it never is brought about by acts of parties. In this respect T-P Act makes departure from English law : in recognising universal succession by gift.

T.P. Act :

The object of section 128, like section 53 (fraudalent transfers) is to preserve the rights of creditors from being defeated by the debtors disposing of their property. But there are three important differences between the two section :

Section 53	Section 128
1. Deals with immovable property alone.	Deals with both movables and immovables
2. Deals with transfers made with intent to defeat or delay creditors.	No such intention is required
3. Transfer is volidable at the option of the creditor.	Here no such option to creditors but he can recover his debt from donee.

This section is also in accordance with the maxim quo sentit *commodum sentire debeteronus* there is no compulsion on the donee to accept a gift made to him. If he finds the property is burdended with too much debts he is free to reject the gift But if he accepts the entire assets of the donor, it is just and equitable that he should also share the liabilities of the donor.

This section applies only where the entirety of the donor's property is gifted to the donee not if only a portion is gifted to him.

Tiruvenkadaswami v. Palani and another : (1962 1. M L. J. 224) :

Where a widow owns two sets of properties, stridhana and limited estate in her husband's estate, she can transfer

only the former and not the latter. So the daughter in whose favour both the surrendered cannot be a universal donee within the meaning of section 128, so to make her liable for the debts due from donor.

Saving Clause section 129 :

The rules found in chapter (VII) of T.P. Act dealing gifts are not applicable to gifts of movable property made in contemplation of death, not to affect Mahamedan law of gifts.

Transfers of Actionable Claims - Sections 130 to 137 :

Section 130 of the Transfer of Property Act Says :

(I) The transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorised agent, shall be complete and effectual upon the execution of such instrument, and there upon all the rights and remedies of the transferor, whether by way of damages or otherwise, shall vest in the transferee, whether such notice of the transfer as is hereinafter provided be given or not.

Provided that every dealing with the debt or other actionable claim by the debtor or other person from or agains whom the transferor would, but for such instrument of transfer as aforesaid, have been entitled to recover or enforce such debt or other actionable claim shall (save where the debtor or other person's a party to the transfer or has received express notice there of as hereinafter provided) be valid as against such transfer.

(2) The transferee of an actionable claim, upon the execution of such instrument of transfer as aforesaid, sue or institute proceeding for the same on his own name without obtaining the transferor's content to such suit or proceedings, and without making him a party thereto.

Exception :

Nothing in this section applies to the transfer of a marine or fire policy of insurance or affects the provisions of section 38 of the Insurance Act, 1938".

Illustrations :

(I) A owes money to B, Who transfers the debt to C. B that demands the debt from A, who not having received notice of the transfer, as prescribed under section 131 pays B. The payment is valid, and, C cannot sue A for the debt.

ii) A effects a policy on his own life with an insurance company and assigns it to a Bank for securing the payment of an existing or future debt. If A dies, the Bank is entitled to receive the amount of the policy and to sue on it without the concurrence of an executor, subject to the provision sub-section (i) of section 130 and the provisions of section 132.

Actionable claim :

English Law :

In English law movable property was said to be either in possession and enjoyment and therefore a chose in possession, or out of possession but realisable by action, and therefore a chose in action. Choose in action is a term used to describe all personal right which can be claimed or enforced by action and not by physical possession. Colonial Bank v. *Whinney* (1885) 30 ch D 261. Here the question was whether the shares of a railway company were choses in possession or choses in action. It was held that the registered owner of shares cannot get anything more than what he has got already if he is kept on of dividends-he can bring his action for those dividends, which may be chose in action. But a share is always chose in possession".

Thus the present definition of choses in action in English law is rather very wide and includes all things which are not in

posession but realisable only through action So it includes all negotible instrument, debentures, bills of exchange etc.

Kinds of choses in action :

Choses in action in English law are classified as either 1) Legal Chooses or 2) Enquitable Chooses. This classification depended upon the enforceability of action in either common law or equity in other words what is the procedure to be adopted in order to reduce it to possession. Is it common law procedure or is it equity procedure? If it is the former it was a legal chose in actions and if it is the latter, it is an equitable chose in action.

A debt or a claim on insurance policy are examples of legal choses, whereas the beneficial interest in a partnership, a legacy, which are enforceable in the Chancery Division are examples of equitable choses.

Indian Law :

The old definition of a chose in action as laid down in section 130, ran as follows :

A claim' which the civil courts recognise as affording grounds for relief, is actionable whether a suit is or is not actually pending or likely to become necessary".

The definition was rather defective, because it was too wide and it included even mortgage debts and also a bare right to sue. This was against the other provision of the Transfer of Property Act and therefore the definition was amended in 1929. The present section is rather clear and it excludes mortgages and claim founded on hypothecation or pledges of movable property and the definition of actionable claim is inserted in Section 130 which reads as 'actionable claim means a claim to any debt other than a debt secured by mortgage of immovable property, or by hypothecation or pledge of movable property or to an beneficial interest in movable property not in the possession either actual or constructive, of the claimant, which the

civil courts recognise as affording grounds for relief whether such debt or beneficial interest, be existent, accruing, conditional or contigent".

So according to the present definition of actionable claim they will come down to this : There are claims recognised by the courts in given relief.

1. As to unsecured debts (roughly corresponds to English legal choses) and

2. As to beneficial interest in movable property, not in possession actual or constructive whether present or future. conditional or contingent (roughly - corresponds to English equitable choses).

A Mohammedan widow's claim for unpaid dower is an actionable claim. A judgement debt or decree is not an actionable claim for no action is necessary to realise it, has already been subject to an action and is secured by the decree. The right to claim the benefit of a contract, or the right on certain, conditions to call for delivery of goods mentioned in the contract was held to constitute a beneficial interest in movable property conditional or contingent within the meaning of the definition of actionable claim and such assignable - Jaffer Meher Ali v. Budge Jute Mils Co. (1.05 33 Cal - 702, A partner's rights to sue for on account of a dissolved partner's; a rights to recover purchase money on the sale being set aside; the right to recover money left in the hands of a vendee are cases actionable claims.

Distinction between actionable claim and a mere right to sue :

A mere right to sue under section 6 (e) cannot the transfer and, It should be distinguished from an actionable claim.

Where the cause of action that is assigned is for an ascertained liquidated sum. It is a debt or an actionable claim. But if what assigned, is only an unliquidated sum than it is a mere right to sue. The beneficial interest in a subsisting con-

tract is an actionable claim, that may be validly assigned. While the claim to damages for breach of the contract is a bare right to sue, the transfer of which is invalid under section 6 (e).

N. Jaffur Mother Ali Budge Jute Co.,

A contracts with B for gunny bags B assigns the contract to C.A commits breach of contract. C can recover damages. The assignment was an actionable claim and so valid. In *Hirachand Nemchand* the assignment of contract was made after breach of the contract, Transfer is invalid because it was in respect of a bare right to sue, as this is only a personal right to sue for damages. Transfer of property along with a right of action :

Where the right of action is incidental or apparent to the right of property, it is not a mere right to sue and is assignable.

Menmath Nath Mullick v. Hadait Ali:

(1932) P.C. 266, As lessee accepted to pay the government the assessment or in default to be liable to A in damages. A sold the reversion to B and also his right to recover certain instalments of assessment which he had paid owing to the lessee's default. The question was whether the assignment of the right to recover the payment of assessment is valid.

Held :

The right to recover the money the lessor paid owing to the lessees default, is only a claim for reimbursement of a particular liquidated sum and not a claim for damages. Therefore it is an actionable claim and hence the assignment is valid.

A decree for mesne profits when ascertained, can be assigned, A right for past or future mesne profits when ascertaind cannot be assigned as it is only a mere right to sue. A right for past mesne profits at a particular rate per mo[illegible]n is assignable.

Actionable claims How Transferable :

English Law :

At common law, originally a chose-in-action was not assignable. Put this rule was broken from time to time and several cases of assignment were held valid under common law.

On the other hand in equity, a chose-in action was assignable even from the earliest times. But there was one important factor, which caused a big difference under the two systems. In common law the assigned could see only if he joins the assignor either as defendant or plantiff; where as in equity, the assignor could sue in his own name without adding the assignor as a party.

The Judicature Act of 1873 simplified such transfer by providing that the assignee by giving notice to the person from whom the assigner had to receive the money, could sue without adding the assignor as a party.

The Law of Real property Act. 1925 considerably modifies the rules so at present the assignment of choose in action are either statutory under the Act or euitable.

A statutory assignment in common law?

1. Must be an absolute assignment:
2. Must be in writing :
3. Takes effect from the date of notice to the debtor.
4. Enables assignee to sue in his own name;
5. Assignee can give valid discharge ;
6. Need not be for consideration.

An equitable assignment :

1. Need not be an absolute assignment but may be by way of security or charge.
2. Need not be in writing;
3. takes effect from the date of assignment; notice being necessary only to the bind debtor Debtor pays, only to assignee ;
4. Must be made for value or consideration and the assignee cannot give a valid discharge unless expressly authorised by assignment.

Indian law :

Indian law has taken in some features both of English common law and equity.

It resembles common law in (i) it must be in writing and ii) the assignee can sue in his own name and give a valid discharge.

It resembles equity in (i) an assignment can be by way of charge or absolutely and (ii) it takes effect from the date of assignment.

Section 130 can be analysed into the following elements :

i) Transfer of an existing claim;

ii) Whether with or without consideration;

iii) Signed by transferor or duly authorised agent;

iv) Notice to debtor;

v) All the remedies shall vest in the transferee.

1. Transfer :

This means only a *present* transfer. It is not only necessary that there should be a present transfer, but it is also necessary that the actionable claim transferred is in existence at the time of transfer. An illustration will make this clear; A share of a partner in a parpartnership and the right to recover it is an actionable claim and assignable. But the right of a partner to a rendering of accounts not an actionable claim and is not assignable. A vendor's right recover purchase money from the purchaser is an actionable claim transferable under this section.

Assignment of part of the debt :

English Law :

There is a difference of opinion whether debt can be assigned in part under common law. The general trend is it cannot be done. *In Durham Brothers v. Robertson* (1890) I.Q.b. 765. It was held there cannot be an assignment of part of entire deb. For then it would be in the hands of the creditor to split up a single cause of action for the debt into as many separate legal causes of section as he might think, fit.

But in equity it can be assigned in part *Inre Steel Wing Co. Ltd.,* was held that in equity there can be an assignment of a portion.

Indian law. :

Under the Transfer of Property Act there is nothing that prohibits a partial transfer, though a few cases have held the contrary. Under section 130, there can be a partial transfer. The following *In re Steel Wing Co Ltd.* The Indian courts have held that partial transfer is valid Rgjamir *v. Suramania* A.I.R. 1928 Mad. 1201 (DB) *Travancore National Bank Subsidary Co Ltd v. Travancore and Quillon Bank Ltd.,* (A.I.R. 1940 Mad. [illegible]) but in enforcing Such a claim it would be necessary to plead the owner of the other part of the debt.

ii) With or without Consideration :

Common law-no consideration as already seen Equity-only for consideration.

Under T.P. Act, the words with or without consideration makes it clear that a gift of an actionable claim can be validity made under this section but however such a gift will be governed by the rules dealing with gifts generally and not dealing with transfers of actionable claims.

As an idol is not a living person within section 5 and as dedication is not transfer, a dedication of an actionable claim to an idol is not governed, by this section and can be made orally *Shopatrao* v. *Sri Ramanchandra* A.I.R 1326. Neg. 429.

This section requires that the transfer should be in writing, The object is that the arrangement between the parties concerned is put beyond dispute. But it is not necessary that a particular form of words should be used.

(iii) Signed by Transfer or his agent :

Registration is not necessary

(iv) Notice to the debtor - Section 131 :

Law prior to 1930 :

Under the old section 131 the operation of an actionable claim was suspended till the assignees gave notice This was also the English law, under Which, the title of the assignee was not complete until the required notice was given, so that a subsequent assignee could obtain priority, over a prior transfer by the mere fact of his giving notice to the debtor.

Present Law :

Section 131 was amended in 1929 Under the present section a transfer of an actionable claim is now complete on the execution of the instrument signed by transferor and does

not depend upon the giving of notice to the debtor. The essentials of notice under section 131 which should be strictly complied with are :

1) Should be in writing;

2) Signed by transferor or his agent;

3) In case the transferor or his agent refuses to sign, transferor of his agent should sign;

4) In such a case the name and address of the transferor should be mentioned.

(v) All the rights and remedies of the transferor whether by way of damages or otherwise shall vest in the transferee.

After the date of the transfer the transferee is the only person who can Sue the debtor whether by way of damages or otherwise.

In this connection, we have to look into section 132 as well as. This section states that the transferee takes the assignment Subject to all equities and liabilities. Under this section the assignee can get only what which is due to the assignor and nothing more. The act that on the date of assignment, the assignee is not aware of the liabilities and equities, does not affect the rule that he takes it only subject to liabilities against the transferor. It is not the duty of the debtor to inform the assignee that the assignment is burdened with obligations.

Section 135 deals with the warranty of the solvency of the debt Where the transferor a debt warrants the solvency of the debtor the warranty, in the absence of a contract to the contrary, applies on to his solvency at the time of the transfer, and is limited. Where the transfer is made for consideration, to the amount or value of such consideration". Warranty of solvency cannot be implied. Unless it is expressed to be continuing throughout it means a limited solvency.

Section 136 deals with the incapacity of officers connected with co. ts of justice. This section lays down an absolute prohibition. "No judge or legal practitioner or officer connected with any court of justice shall buy or traffic in or stipulate for or agree to receive share of or interest in, any actionable claim, and no court of Justice shall enforce, at his instance, or at the instance of any person claiming by or through him, any actionable claim so dealt with by him as aforesaid".

The object of this section is to see that officers of court are above suspicion. The Privy Council in *Kerakoose V.Serle* (1846) stated. "It is one of great importance in all countries and more particularly in a country like India, that no officer of a court or Justice should be even exposed to the suspicion that in the discharge of his official duties his conduct may be influenced by and personal consideration".

Section 137 saves, negotiable instruments from the provisional of the chapter on actionable claims.

Lesson - 9

THE LAW OF EASEMENTS

(The Indian Easements Act. 1882)

Definition of Easement :

Section 4 of the Act defines an easement as: "An easement is a right which the owner or occupier of land possessor as such for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon or in respect of certain other land not his own".

The land for the beneficial enjoyment of which the right exists is called the dominant heritage', and the owner or occupier the 'dominant owner', the land on which the liability is imposed is called the 'servient heritage', and the owner or occupier the 'selvient owner'.

At the outset itself we should understand that 'land' means and includes all things permanently attached to the earth; and 'beneficial enjoyment' also includes all possible convenience, remoto advantages and even a mere amenity; to do something, includes removal and appropriation by the dominant owner for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage, or anything growing or subsisting there on.

Illustrations :

1. A right of way across neighbour's land for purpose connected with the beneficial enjoyment of the house.
2. To take water from a spring in the land of a neighbour for household purposes.
3. Right to take water, fish leaves wood etc. fur use in his house or land. There are easements. But the right of the

public to right of way in private land or a duty to keep a river clean following throught his land for the benefit of a lower riparian owner are not easements.

An easement is a right enjoyed by one owner of land (of building) over the property of another, it always contemplates two owners (or occupiers) and two properties.

Now, let us analyse the characteristics of an easement.

1. Easement must be appurtenance :

It is one which is in separably attached to the tenement and connected with the enjoyment of the dominant tenement.

2. Owner of land cannot have easement over it :

A man cannot have an easement over his own land, because all acts which are done upon his land are acts in respect of his rights as the owner of land, and the flaw does not allow the coexistence of an easement over land with the possession of the land itself.

Easement does not confer exclusive use of servient tenement :

The dominant owner cannot have a right to the exclusive, use of part of the servient tenement and thus prevent the servient owner from making ordinary use of his land.

According to Gale the general qualities of easement are as follows :

1. Easement is thus an incorporeal right.
2. There must be two separate properties.
8. The two properties must belong to two different owners.
4. It is a burden imposed on the servient property and benefit on dominant property. It always goes with the property to which it is attached. Whoever owns or occupies the dominant property enjoys the easement also.

5. It cannot be transferred separately for it came of exist separately. It is always annexed to the property.

6. There is no participation in the profits of a servient tenement.

Dominant and servient heritages :

We have already seen that an easement involves two tenement and the benefit and burden of the easement are inseparable from a the tenements and so accompany the transfer of the tenements.

The characteristic of an easement to attach itself to the dominant tenement is called 'appurtenance', and the easement is said to be 'appurtenance' to the dominant tenement. Because of the characteristic not only the owner but also an occupier of the dominan tenement is entitled to enjoy the easement, and to sue against obstruction. A lessen who acquires an easement by prescription under section 12 acquires it not for himself and his leasehold interest but for the dominant tenement.

The fact that the occupier is a trespasser or a benamidar, does not bar him from suing for removal of an obstruction to an easement, for the servient owner has no higher right against a trespasser than against the true owner or the legitimate occupant of the dominant tenement. The term 'land' includes houses, wells, trees and other permanent fixtures.

Beneficial enjoyment :

An easement right is to provide for the dominant owner better enjoyment of the dominant heritage. It also includes a possible convenience, a remote advantage or more *amenity*.

Continue to do :

It is an essential features of an easement right that it should be a right not merely to do some single act, occassions if not continuously. It was also meant to 'continue to prevent'.

Removal and appropriation :

The expression "to do something" includes removal and appropriation by the dominant owner, for the enjoyment of the heritage, of any part of the soil or anything growing or subsisting on the servient tenement. This under English law may not be an easement but easement but only a profit, or *profit a prendre*. In India profit a prendre appurtenant is an easement. The Supreme Court in State of Bihar v. *Subodh Gopal* A.I.R. 1968 S.C. 281 made the following observation: *"A Profit a prendre* in gross that is a right exercisable by an indeterminate body of persons to take something from the land of others but not for the mere beneficial enjoyment of a dominant tenant, is not an easement within the meaning of the Easements Acts".

Easement created by agreement :

Any casement right created by agreement and Which amounts to an interest in immovable property, will pass along with the property into the hands of transferee, a right to fish for prawns by the dominent owner on the servient tenements whose the assignor of the claimant had cut a canal through the servient tenements and agreed the servient tenements could use the water for agricultural purpose and in consideration there of the assignor could fish for prawns by placing a net in The channel in the servient - tenements *Varghese Poulose v K.I. Methew. A.I.R. 1965 Ker 17.*

But where a man enters another's land for purpose of worshipping a deity installed there, cannot claim an easement right as the worship of a deity on another's land is not necessary for the beneficial enjoyment of one's own land - *Har Dayal v.Choal A.I.R. 1960 - All 32.*

What are not easements :

Right to use a public highway or a village road. Right to draw water from a public well or even another's well : Here no right of easement can arise.

Comparison of Easement with analogous rights :

i) Easement and natural rights :

Natural rights are merely part or the total dominion over property and admit of curtailment by another's easement. A natural rights cannot be extinguished, though an easement can be extinguished by release, misuse, forfeiture or permanent alteration in Tenement. Right to support; a right which the owner of land on a higher level has of discharging his surplus water on the land at a lower level are some of the natural rights and they exist *abinitio* and are not created by prescription, grant or custom. They are mainly inherent in the geographical configuration of the property.

ii) Easements and interest in property ;

A light which enables an exclusive use and occupation of any part of a tenement is a proprietary right. A Jalker which is species of fishery rights common in Bengal is held to be an interest in property and not an easement. An easement is only an curtailment of the proprietory right and never totally excludes the servient owner from use and occupation of the servient tenement.

iii) Easements and customary and public rights :

A customary right is a right in gross, but an easement is always appurtenant. Where a customary right is appurtenant, then it is customary easement. Customary rights vest in a class of indeterminate person like the public or the inhabitants of the village and are not created by satute. Easements vast in determinate individuals.

iv) Easement and licences :

A licence merely permits a man to do some Act on another's land, which in the absence of such permission would be illegal. To hunt another's park. It is revocable and being

merely personal, terminates on the transfer of the tenement in respect of which the licence is held. A licence cannot assign his licence; not can it be acquired by prescription as it depends upon a grant.

v) Easements and Covenants :

Covenants are found in sections 11 and 40 of the Transfer of property Act. They run with the lands except they do not bind the bonafide transferee for value without notice. So we find the burden of it does not always run with the bonafide transferee for value with the land, even though the covenant is for the beneficial enjoyment of the covenantee's land.

JOINT HERITAGE

i) When property belongs to several co-owners, user by one of them does not give rise to an easement, for as easement can exist in respect of land not one's own. A co-sharer has a right over the entire property, even when for purposes of convenient enjoyment each sharer is given a plot. So long as it remains joint ownership. But there must be reasonable user. To construct a drainage in common property is held reasonable user in *Mohanchand v. Irlakbhai* 25 Bom 54:8. *In Traders and Mines Ltd. v. Dhilendranoth Banerjee* A.I.R 1944 Pet, 261, It was laid down the principle that an easement and co - ownership cannot exist in the same property.

ii) When there is intermediate joint property, such as a strip of land held Jointly by two owners between their separate property, the Bombay High Court held that light and air passing over from one tenement to another cannot be claimed as an easement as it passes over the joint property. It proceeded on the principle that as easement cannot be acquired in one's own property. But in *Vallia Nannadiar v. Eashwaran* A.I. R. 1959 Ker 408 relying on *Sansi Raja Naidu v. Rajagopalan* (A.I.R. 1924 Mad. 812) that where before severing the plaintiff's plot from the defendant's plot there was a channel irrigating

the land, the transfer was entitled to the same means of irrigation after transfer, as it was attached to the land transferred, even though the channel remain on the defendant land unless there was a contract to the contrary.

iii) Balcony over common ground :

If a balcony projects over, common ground such a common street land, so long as there is no ouster of other co-owners to enjoyment of that common land. Such that enjoyment of that air space may ripen into a proprietary right by adverse possession, the other co-owners may not have any remedy by way of injunction.

Eaves, Cornices, balconies of varying utility :

All these project on the air space above neighbour's land. The questions, here is whether such projections give rise to proprietary right by adverse possession of twelve years or to a prescriptive easement by twenty years uninterrupted user at common law. The Bombay Hign Court finally confirmed in the cases of *Dahvabhal* v. *Hiralal* 37 Bom. L.R. 959 and *Shambhu Prasad v. Labhai* 38 Bom L.R. 264, that right to project eaves etc., is in the nature of an easement and not a proprietary right but the Madras High court took the contrary view that the right to project eaves etc., is perfected by twelve years adverse possession and is not an easement requiring twenty years use - *Varrey Tuloxammary v. Nanndhia Buckiromaiah* A.I.R. 1948 Mad 826.

The Rights of way :

This is a frequently occuring kind of easement, When it arises by grant or prescription: it is a right in favour of the owner occupier of the dominant tenement to use for the purpose of a way some part of the soil of the servient tenement however it does not give a right to wander at random over the servient tenement. A right of way very often arises as an easement of necessity upon severance of tenements under section

- 13; It may also arise out of a customary right in labour or a large body of persons like the inhabitants of a village. But it must be understood that a public right of way is not an easement but is a mere right.

Certain other rights and claims :

For a right to drain, a co-owner on a common passage is entitled to lay underground drains through the common passage, so long as it does not interfere with the existing drains and the other rights of the co-owners.

As to a claim to overhang branches of trees:

No one has a right to let the branches of his trees to hang over his neighbour's land. In English law there cannot be a prescriptive easement overhang branches of a *tree-Lemmon v. Webb* (1894) 3 Ch.80 Where penetrating roots or overhanging branches are concerned a person is entitled to cut them off or to obtain An junction to remove them even where there damage is not proved. *'Vishnu v. Vasudeo* 43 Bom. 164 But where there is an implied grant in the conveyance, though it may not be an easemant within section 4 of this Act, as in the severance of tenements the tree comes to the defendant while some of its branches are overhanging on the plaintiff's land or and it roots are penetrating on the land. *Arumugha Goundan v. Rengaswami Gounden,* A.I.R 1938 Mad. 511.

The claim to collect fruits falling on neighbour's land From one's own tree, again there is "no such right. There is also no right to the free FLOW OF BREEZE either to work a wind mill or for personal comfort of dwellers in a house. But Indian Courts Which treat the right to air as much more important that the right to light have given a permanet injunction not to obstruct the windows and other aperures in the wall of the house prevailing a through draft of wind B.S. *Ammani V.T.S. Renganayaki Ammal* A.I.R. 1926 Mad 891.

The Kumaki right of ryotwari holders to collect leaves for manure and graze cattle in adjoining forests can be terminated at any time by the Government. Ipso facto such a privilege is extinguished when forest lands are sold, therefore such a right cannot amount to a right of easement, which under section 4 is a right "to do and to continue to do something etc."

The right to commit nuisance has been recognised by English law as an easement that can be acquired by prescription. To discharge smoke though smoke-holes to neighbour's land, to pollute the air. But there is no question of acquiring an easement right to commit a public nuisance even by prescription. Any act which capable of common injury, danger or annoyance to the public or those who dwell or occupy property in the vicinity, is a public nuisance. But Indian law also to commit a private nuisance as easement can be acquired by prescription if it had been authorised in its commencement as a grant by the owner of the servient land and it is an easement appurtenant. *Gopi Krishna v. Municipal Committee Agra* A.I. R. 1958 M.P. 371.

Where there is Terrace Agriculture in Indian law an easement by prescription can be acquired by lower owner for water flowing from a higher level in a hilly district, if it flows in well defined channels.

There are a large number of other rights recognised as easements prescriptive or customary; such as, light of way over another's land; right of passage of boats in rainy season over water belonging to another; right to discharge flood water on the neighbour's land; right to put a ladder on neighbour's open land for painting or repairing one's property; right to take water from another's well; the right to carry water in channel across another's field; the right to store grain on another's courtyard and thresh them; to stock manure on another's land; the right to take earth from another's land; natural rights etc.

There are many number of these easement rights. In England no Court will allow new or novel easements. However the trend is towards adaptation of existing and recognised easements to new and improved conditions life. In India whether a claim to right falls within the definition of an easement in section 4, will be considered in each case and it is to be noted that the language of section 4 is very wide so as to include even possible convenience remote advantage and a mere amenity - *Sheoraj Chamar* v. *Mudeerkhan* S. All - 163.

Continuous and Discontinuous, Apparent and Non-Apparent Easements :

Section 5 deals with continues, or discontinuous apparent or non-apparent easements. A continuous easement is one whose enjoyment is, or may be continued without the act of man A discontinuous easement is one that needs the act of man for its enjoyment.

An apparent easement is one the existence of which is shown by some permanent sign which upon careful inspection by a competent person, would be visible to him,

A non-apparent easement is one that has no such signs illustrations. a) A right annexed to B's house to receive light by the Windows without obstruction by his neighbour A. This is a continuous easement.

b) A right of way annexed to A's house over B's land, This is a discontinuous easement.

c) Rights annexed to A's land to lead water thither across. B's land by an aqueduct and to draw off water thence by a drain. The drain would be discovered upon careful inspection by a person conversant with such matters. These are apparent easements.

d) A right annexed to A's house to prevent B from building on his own land. This is a non-appearent easement.

Classification of Easements :

1) Affirmative and negative easements

2) Continuous and discontinuous easements - Section 5.

3) Appearent and non-appearent easements - Section 5.

4) Permanent and limited easement - Section 6.

5) Subordinate eas ments - Section 9.

6) Accessory easements - Section 24.

7) Easement of necessity - Section 13.

8) Quasi easements - Section 13.

9) Natural rights or natural easements - Section 7.

10) Customary easements - Section 13.

Continuous and Discontinuous Easements :

As already noted & continuous easement is one which does not depend an the act of man. It must be an act on the servient tenement. Opening a shutter for letting light and air in. This can be continued to be enjoyed without an act of man on the servient tenement. A right to discharge rain water on a servient tenement is one such.

A right of way is discontinuous as every step a man takes is necessary for the enjoyment of the easement and such steps are all on servient tenement since it can be enjoyed only by actual use by the party. The right to take water, from well is a discontinuous easement - *Polden v. Bastward I. Q. B. 156.*

Apparent and non-apparent easements : An apparent easement means not only one which must necessarily be seen but one which may be seen or known on a careful inspection a competent person which mean by a person ordinary conversant with the subject.

Thus an easement of light and air is evidenced by the existence of an aperture which would be visible to a competent person. The easement of discharging water from eaves on the land of another A right of way visible by a well formed path is apparent. In *Gangulu v. Jagannathan* A.I.R 1924 Mad. 108 the existence of event was considered suffisient to make it an easement of taking water through them, apparent easement. In the absence of a drain or well-defined channel to pass water from one tenement to another can only be a non-apparent easement.

Affirmative and negative easements :

Affirmative easements are those which entitle the dominant owner to make active use of the Serviant tenement, which in the absence of a right would amount to a nuisance or trespass. Negative easements are those which restrain the servient owner from exercising an ordinary right of ownership over his land. A right of way is affirmative, but a right of light and air are negative. Every negative easement is a continuous easements while most of the affirmative easements are discontinuous, but with some exceptions such as discharging water by means of a drain on the servient tenement is continuous.

Easements for limited time or on condition :

Section 6 says, An easement may be permanent, or for a term of years or other limited period, or subject to periodical interruption, or exercisable only at certain place, or at a certain time, or between certain hours or for a particular, purpose, or on condition that it shall commence or become void or voidable on the happening of a specified event of performance or non-performance of a specified act "

Easements are permanent when the dominant owner is entitled to enjoy them for all time and under all circumstances unconditionally, Section 6 contemplates all possibilities of limiting the enjoyment of easements such as limitat...

time or purpose. It may also be subject to conditions both presentment and subsequent'. Section 6 applies to easements acquired by prescription also. Thus a right of way for scavengers or for agricultural purposes acquired by prescription is limited to a purpose. A right to take, water for a second crop, right to access to carry repairs, or perform religion ceremonies on certain days are other examples.

Easement restrictive of certain rights :

Section 7 "Easement are restrictions of one or other of the following rights, namely",

a Exclusive right to enjoy :

The exclusive right of every owner of immovable property (Subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof accessions thereto.

b) Rights to Advantages arising form situation :

The right of every owner of immovable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.

Illustrations of the right verified to :

The light of every owner of land to build on such land; to air free from pollution by others; to physical comfort on which is not to be materially and unreasonably interfered by noise or vibrations caused by others, to light and air as pass, vertically thereto : a support rendered by the subjacent and adjacent soil of another person, a right to water which naturally passes or percolates by over or through his land, unpolluted by others; to collect and dispose of all water on his land which does not pass in a defined channel: to water of every natural stream which flows in a defined channel; or lake or pond to be available for use, without any obstruction and material alteration by oth-

ers in quantity, temperature, direction or force; a right that the adjacent owner of falling on, such land and not passing in a defined channel; right to have recourse for household purposes irrigation watering his cattle and sheep etc., water of natural stream, lake or pond abutting his land.

All the illustrations mentioned above are applicable to land, soil, streams etc., in its natural condition or state and not applicable to structures built on the land. These are all natural rights. Therefore we have to distinguish between natural rights and easements.

Natural rights and easements :

Natural rights are those inherent in land ensure nature whereas easements are created at the will of the owner of the land over which they used and may be inconsistent with the natural right which, the law has annexed thereto with the result during the subsistence of the easement the nature right is suspended. So an easement is a restriction on the natural right of another property.

Natural rights are rights in rem. Natural rights are themselves subject to restriction at the instance of easements. Basements are the 'acquired restriction' or 'acquired rights' abstracted from the right of general ownership of the property of another and added to the ownership of the dominant tenement. But it must be remembered that these natural rights have their own restrictions for use of one's property, are subject to the natural rights of another property, namely, the adjacent, or adjoining property.

Where easements are concerned the section is clear and it states the general principle that easements are essentially restrictive in their nature it means that easements do not exclude the owner of the servient tenement from use and enjoyment of his rights they are not exinguished, but merely restrict such rights. Easements therefore cannot exist or be transferred

apart from the dominant heritage. Disturbance of ownership and natural rights amount to trespass, but Disturbance of an easement is only a nuisance.

Right to light and air :

An easement to enjoy light and air passing over another's land is in the nature of a restriction on the right of another. This is of course subject to right of every land-owner to build on his land; A right in respect of light and air passing laterally or horizontally to a piece of land can be acquired by easement which would restrict the right of an owner of land to build thereon under section 7 (a). The natural right to the unpolluted flow of air can be restricted, by a person acquiring a right to issue smoke, obnoxious smell or to commit any other nuisance of the same nature which would be in the nature of a restriction of a natural right that is a easement, For the purpose of having the effect of restricting the adjacent owner's right to build on his land, the claimant should acquire a right of easement. If such a right is not required by easement the adjacent owner's proprietary right to build on his land prevails against a natural right.

So a right to the light and air may be either a natural right forming one of the incidents of property or it may be an easement: There is a fundamental distinction between the exercise of these two rights. Where an owner is entitled to a natural right to the lateral flow of air and light and thus amounting to ancient lights and finds that such lateral passage of adequate light and unpolluted free air. as obstructed to an appreciable and sensible extent by an adjoining trespasser, then he can get the nuisance abated; but there will be no question of abatement if the obstruction is causes by the true owner of the adjoining property, as he himself has a right to build up to the edge of his own property, and exercise the same rights as the complaining owner *Cujus est solum exjusest usquead coelum et ad in feros* (whosever is the owner of the soil, it is his even to the skies and the depths below).

But where the owner his an easementary right to air and light coming laterally to his land; (every owner of land or building has a natural right to light and air vertically coming to his property and which does not require to be acquired by an easementary right), then the adjoining land is burdened with such an easement convening it into a servient tenement giving rise to an action in case of interference with it by the servient event a trespasser on the servient tenement has acquired over a period of 20 years an easementary right to obstruct the lateral passage of light and air to the dominant tenements, at the end of the prescriptive period; the right of the dominant tenement, is extinguished. *Compbell V. Peddington Corporation.*

The general of rule embodied in the maxim *eujus est solum* etc; is today qualified by the Air Navigation laws.

A person is entitled to open a door or windom in his own wall unless he is under legal obligation not to do so. Where the plaintiff alleged that the defendant opened a door and a window in his wall adjoining the vacant strip of land, it was held there is no cause for complaint because he failed to establish that this strip of land belongs to him- Permatma Prasad v. MST. Sampta A.I.R. 1968. All 184. There can be no question of acquiring an easement of light and air over property jointly owned by him with others. S.B Kapedia v.NB. Kapadia A.I.R 1967 Guj. 87.

Right of support :

(1) General; Section 7 in its illustrations recognizes in express terms the existence of a right of support lateral and vertical in favour of one piece of land in its natural condition by another. It is a right, but for which no property could he safely enjoyed by its owner. English law recognises this as a natural right. But it must be noted that this right is available in respect of land that is in announdened and natural state, that is land in its natural condition when it is not excavated and not subjected to artificial pressure" - *Corporation of Bimingham v. A ljen* (18.7) 6 Ch.d.284

Explanation to section 7 reads as follows :

"Land is in its natural condition when it is not excavated and not subject to artificial pressures; and the 'subjacent and adjacent soil, is such soil only as in its natural condition would support the dominant heritage in its natural condition". So it is clear that the land for the purpose of this right should not be subject to artificial pressures. Section 15 of the Act provides that land subject to artificial pressure such as when buildings are erected upon it receiving support from another person's land, should have had that benefit without interruption for 20 years and that 20 years must expire 2 years before the institution of the suit Where the plaintiff has not been able to satisfy the provisions of sections 7 and 15, held the plaintiff's suit for damages on the ground that the compound wall was damaged and deprived of lateral support due to quarrying on the defendant's land must fall - Gopalakrishnanikar v. V. T. Devaswom A.I.R. 1965 Ker. 202. So from all this it is clear that the right of support for buildings or structures on and has to be acquired only as an easement; for a man in exercise of his right of property can build to the very extremity of his land and his neighbour has no cause for complaint unless the neighbour can show he has acquired a right of lateral support to his building by way of an easement or a prescriptive right.

(E) By subterranean waters : There is no natural right in favour of an owner of land in respect of support by subterranean waters. The owner of the adjacent soil cannot be prevented from doing anything on his land which may have the effect of draining water from below the land in respect of which the right is claimed. It by constructing on one's land water is withdrawn from the neighbouring land causing damage to the property thereon, no action will lie. *Popple Well v. Hodgkison* (1869) L.R. 4 Ex. 248. Cockburn C.J. held that "there is nothing at Common Law to prevent his draining that soil if for any reason it was necessary or convenient for him to do so". But this right is subject to a contract to contrary and action will lie only if actual damage is sustained.

Riparian Rights :

A riparian owner is a person whose land abuts on a natural stream or a lake, or a tank. The owners of a land tabulating on the tributaries which feed the stream are riparian owners and as such entitled to natural rights of land subject to the liabilities or the riparian owners. No land which does not touch these natural streams can be considered as riparian tenements. The owner may nevertheless by virtue of proscription or grant acquire easement to make use of the water of a river stream for definite purpose when there is a riparian owner not all his land even to the extreme and of it is entitled to this natural right, but he is a riparian owner in respect of the land only up to a reasonable depth. In *Emant Laxminarasu V.Secretary of State* it was pointed out a depth of about half a furlong reasonable. Nor can a riparian owner, use the water for a land which is not on the bank. It is also necessary that to give rise to any riparian rights the body of water where the land is situated should be a river, she, her tidal or non-tidal, and not a mere depression where rain water collects.

Certain principles are laid down governing reparian rights :

(i) A riparian tenement must have contact with the stream which also connotes a reasonable proximity to the river back if the riparian land is a narrow strip, than back lands enjoy riparian rights if both are under the same ownership.

(ii) This is a natural right and so incapable of being lost by non-user.

(iii) The fights of a riparian owner is subject to the right of other riparian owner to the reasonable enjoyment of the waters.

a) for ordinary or primary purposes :
b) for extraordinary or secondary purposes, and
c) for purposes unconnected with the riparian tenement.

(iv) When water is used by the upper riparian owner for the purpose of irrigation, it is subject to restriction that the amount taken should not hurt the right of the inferior of lower owner to have the stream passed on to him practically diminished.

(v) When there is use of water unconnected with his riparian tenement, injunction can be issued though no actual damage is sustained, on the ground that if such use is allowed will acquire a prescriptive right.

(vi) A riparian owner cannot except as against confer on easement right to the use of water on a non-riparian owner.

Doctrine of lost Grant :

This doctrine was evolved in order to enable title to be made by prescription despite the impossibility of proving immemorial user. An important condition is that the claimants must show that the right claimed is attached to an estate in land of which they are owners by devolution. From this it follows that the inhabitance of a Village cannot be nomine prefer any such right Secondly, any right that is so claimed must be a right capable of being the subject of a grant and there must be a person capable of making such a grant. The Supreme Court reaffirmed this doctrine and the principles underlying it in the cases of B raja Sundar dab.v.Moni Bahra. (1951) S.C.R.431 and *Manohar Das Mohanta v Charu Chandra* (1965) I.S.C.R 1168.

It is necessary to define what a Stream is, a stream for purpose of this section is water which runs in a defined course. So surface water or surface drainage cannot be a natural stream in respect or which neither a natural nor an easementary right can be claimed. A natural stream does not cease to be one such even where the water is exhausted, or flows indirectly through another channel, or that it spreads itself over intervening fields, because such a spread does not convert to stream water.

Whether the stream, is a private Stream or a public one, these natural rights ensure to every land abutting on the stream. But no riparian right where private or tanks are concerned. There is also right of navigation in public streams as a member of the public. Whereas the riparian owners are presumed to be owners of the bed of a private stream up to mid stream but they have no proprietary right in the water passing by their land. They can have only right of reasonable use of such water.

Streams may be Natural or Artificial :

A natural stream is one which flows at its source by the operation of nature e.g. streams having their origin in the Himalayas. An artificial stream flows from the source itself by the operation of man and flows through an artificial channel. Therefore the abutting owners of an artificial stream, which over a long period may have the incidents of a natural stream, cannot claim riparian rights as natural rights, but can claim these rights only under special circumstances.

Where Subterranean Streams are concerned, the law relating to natural streams above the ground applies equally to subterranean streams following in a defined and known course. The law does not apply to percolating and underground water which does not flow in defined channels.

Artificial Water-scurses :

An Artificial stream is a stream which flows as us source by the operation of man or if it flows at its source by the operations of nature, flows in a channel made by man, An artificial water-sourse which does not possess the incidents of a natural stream is presumed to be in the ownership of the person who has constructed it and riparian rights can only be acquired either by a grant or prescription.

Alluvion and Diluvion :

- Any accretion by alluvion, which enlarges the estates whether from the sea or river, will he considered as belonging to the estate to which it is annexed. The principle is based on the rule of necessity for the permanent protection and adjustment of property and as pointed out in Faster v. Wright (1878 4 C P D. 438 "on the impossibility of identifying from time to time small additions to of substraction from 'and caused by the constant action of running water". Accretion may be (i) gradual and imperceptible additions of sentiment, so that the bank shore is extended into the water. This is accretion by alluvion (ii) the gradual retirement of the water from the shore by the lowering of its level. This process is called dereliction; and (iii) the process which is very rare, by which a large quantity of land is suddenly added to the shore by its severance bodily from its former location. This is also called alluvion. Another form is the emergence of Islands in the bed of the reformation *im situ*.

Rights to River beds :

The law relating to this is well settled indian law can be stated in proposition 1) the bed of a navigable river tidal or not is vested in the government, unless it is granted to a private individual *Maharaia of Pithapuram v. Province of madras I.L.R.* (1949) Mad (75 (2) to create a title to the rival bed in the Government the river should be navigable at that part of it where the disputed plot are situated (3) a river is not navigable in India unless it is navigable throughout the year (4) Facility for passage of large river crafts sufficient to call a river navigable river.

Even where the bed belong to the government or a private person the riparian owner can claim accrections to his property - Secretary of State v.Raja of Vizayanagaram I.L.R. 45 Mad, 207 (P.C.)

Rights of fishery etc :

Exclusive right of fishing in a given place an individual can claim for himself such a right even if others have a rights to a particular class of fish in the fishery or that another has right to fish for a particular time only.

Ferry Rights :

It is recognised law in India that a man may set up a ferry in his own property and take toll from strangers for carrying them across, and may acquire such a right by grant or by use, over property of others. Such rights are controlled by laws made for registration of private ferries and certain safety regulations.

Right to Divert Water :

Every riparian owner whether higher or lower riparian owner has a right arising jure nature to accustomed flow of water both as to quantity, and quality. His right to ordinary or primary use of water flowing from his land extends to domestic purposes including purpose of his cattle. This he can exercise without regard to diminution of supply to lower owners. His right to extraordinary or secondary user as to agriculture can however be exercised only within limits. He can impound and divert water to irrigate his land adjacent to the stream but such right is neither absolute nor exclusive. He cannot abstract any amount of water, as his right is conditioned by similar right of other riparian owners. Therefore The user of the stream should be reasonable and capricious as to inflict injury on others similarly situated. The quantity of water diverted, the made in impounding and channelling the water should be reasonable. Any impounding and channelling along artificially by him should not obstruct the flow of the water, down stream and should not divert the natural course of the stream. This is because the rights of the lower riparian owners is to have the water of the stream transmitted to them continuously and in a manner which

does not materially affect, their enjoyment- of the right. Even water that flows under ground in defined channels cannot be obstructed diverted to the prejudice of a lower riparian proprietor.

Pollution of Water :

The riparian owner can insist that water shall not be polluted even if no damage has accured to him. This right extends to water naturally passing or percolating by, over or through one's land and is not confined to water passing in a defined course, or in a lake or pond. Like every riparian right this right arises but of the ownership of land in contract with the stream.

Surface Water :

As already seen in the illustrations to section 7 every owner of land has a right to collect and dispose within his own limits of all water under or on the surface of the land which does not flow in a defined channel. Also every owner of upper land has the natural right that water naturally rising in, or falling on, such land, and not passing, in defined channels shall be allowed by the owner of adjacent lower lands to run naturally thereto. But having stored diverted and used such water in any way he chooses, he cannot be allowed to cause that water to go upon his neighbours land so as to affect that neighbour's land in some other way than the way -in which it had been affected before.

No easementary or prescriptive right can be claimed in respect of surface water or underground water which does not flow in a defined channel, if the lower owner wants to build on his land nothing prevents him but he has to make some arrangement or way by which the water from a higher tenement may flow away as a natural right must be regarded as a right given to the owner of land having regard to the natural configuration and situation of the land. This natural right of the upper owner exists for all times. The natural right

of drainage is only in respect of surplus water naturally falling in or rising or coming to the land of the owner. It does not extend to water artificially brought on to it.

Excessive and non-Riparian user :

A non-riparian user cannot be justified except as an easement acquired either by prescription or grant, actual, constructive or presumed.

The Imposition Acquisition and Transfer of Easements :

Section 8 deals with the imposition of easements :- "An easement may be imposed by anyone in the circumstance, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed".

Illustrations :

(a) A is a tenant of B's land under a lease and for an unexpired term of twenty years and has power to transfer his interest finder the lease. A may impose an easement on the land to continue during the time that the lease-exists, or for any shorter period.

b) A is a tenant for life of certain land with remainder to B absolutely; A cannot, unless with B's consent, impose an easement thereon which will continue after the determination of his life interest.

c) A,B and C are co-owners of certain land, A cannot without the consent of B and C, impose an easement thereon or any part thereof.

d) A and B are lessons of the same lessor. A of a field X for a term of five years, and B of a field Y for a term of ten tears. A's interest under the lease is transferable; and B's is not. A may impose on X, in favour of B, a right or way terminable with A's lease.

Creation of Easements :

By express grant : No particular form or words are necessary. But the intention is to be manifested unequivocally. It may be oral or in writing. Even if it is in writing it need not be registered; for it is not a transfer of ownership under Section 54 of the Transfer of Property Act. But if the easement granted is one of incorporeal rights and it is in writing under the Registration Act it may require to be registered. If the consideration is not less than rupees hundred. Section 8 also includes lights, ferries, fisheries and other benefits to arise out of land.

As an express grant which creates an easement is contractual in nature, it is governed by the principles relating to contracts. The consideration may be a lump sum, or recurring annual or periodical payments. Where the grantor does not possess full proprietary ownership but holds the tenement only for a term of years, the easement he has created by an express grant can only be coextensive in duration to his own limited interest. The word "impose" in section 8 to 11 means the creation of easements by grants. The Act uses the word 'acquire' when referring to a prescriptive easement.

2) Implied grant : Here though there is no express or specific grant such a grant, in a deed of conveyance there may be general words, on some indication or hint, which would be legally held to be evidence of intention to create such an easement. A grant may be presumed, that is to say, easements are presumed by operation of law to be created in favour of one part and against the other part when a place of property is divided into two parts either by transfer inter vivos, or bequest or devolution on intestacy. For example usually rights of way. These are dealt more elaborately under section 13.

Section 9 is to the effect that a servient owner may impose on the servient heritage any easement, provided it does not lessen the utility of the existing easement. If it does then the consent of the dominant owner has to be obtained. The

illustrations a plied to the section are : (a) A has in respect of his mill a right to the uninterrupted flow thereto, from sunrise to noon of the water of B's stream. B may grant to C the right to divert the water of the stream from noon to sunset; provided A's supply is thereby not diminished b) A has in respect of his house, a right of way over B's land, B may grant to C, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way provided that A's right of way is thereby not obstructed.

Easement of necessity and quasi-easement :

Easements of necessity and quasi-easements are dealt by section 13. Easements of necessity were justified on the doctrine that no grant could intend to alienate what is absolutely necessary. If there is severance of a tenement by sale, the vendor retaining part of it and the deed does not list certain rights and labilities of the vendor and vendee, than the law deems expedient to fix upon the parties these rights and liabilities in the absence of any specific expression of their common intention. These rights or easement did not exist prior to the severance. They are created only as a result of severance in favour of one newly created heritage and against the other newly created heritage. A right to take water from the well which before severance irrigated the whole field and which is in that portion retained by the seller. If the deed contains no referrence on this point, the law will grant to the purchase of the part-heritage an easement to take water from the well situated in the other, part - heritage retained by the vendor.

From the above it is quite clear that an easement of necessity means an easement without which the property cannot be used at all and not one merely necessary to the reasonable enjoyment of the property. To claim one care- track through defendant' land as an easement of necessity, when there was another cart- track which could be conviently used, though inconvenient in the rainy season, by the plaintiff to reach his field, will not be upheld P. Seetharamapp

V.P.Appaiah A.I. R. 1964 4 P. 84. It must also be noted that an easement of necessity cannot arise in any way except on severance of tenements. And the necessity must be absolute necessity and not ordinary necessity. Particular easement is of necessity are right of way, for sweepers, drainage, lateral support scaffolding for repair word, etc.

Quasi · Easements :

Section 13 besides providing for easements of necessity on severance, provides for another kind of easement to be saved on severance, known as quasi-easements. These differ from the former in one respect and that is easements of necessity may or may not be in existence during unity of ownership, bill quasi-easements must have been in existence before severance of tenements. While an easement of necessity for its creation defends on the necessity existing at the time of severance, and the question of prior user, if there has been any, is of relevance only in determining the extent of the right of an easement arising by necessity. A quasi-easement contains prior user as an essential ingredient in the conditions determining its creation, and prior user is unquestionable a factor in determining its extent. It is saved on severance, if it fulfills three conditions; firstly, that it is apparent; secondly it is continuous and thirdly, it is necessary for enjoying the severance. These can be expressly reserved, at the time of severance; they can be also implied to have been reserved in which case it is necessity which justifies an inference of implied reservation.

Qualified necessity :

Whereas the easements of necessity are based on absolute necessity, quasi-easements are only reasonably necessary, and so are referred to easement of qualified necessity; which means nothing more than mere necessity to continue prior user. The quasi-easement also arises only on severance; for before severance they are the ordinary rights of property and assume the characteristics of easement only on severance. Even where

the government is a party section 13 applies. Severance may take place by acquisition, by a decree of a court or by . direction of a court, or by adverse possession or by estoppel

Illustrations :

a) A sells B a field then used for agricultural purpose only. It is inaccessible except by passing over A's adjoining land or by trespassing on the land of a stranger. B is entitled to a right of way, for agricultural purposes only, over A's Adjoining land to the field sold.

b) A sells B a house with windows overlooking A's land, which A retains. The light which passes over A's land to window is necessary for enjoying the house as it was enjoyed when the sale took effect, B is entitled to the right and A cannot after-word obstruct it by building on his land.

c) A sells a house B and the adjoining land to C. The house has windows over looking the land. B is entitle to the light which passed over the land at the time of sale for reasonable enjoyment of the house and C cannot obstruct the right by building on the land, for he takes it subject to the burdens to which it was subject in A's lands.

d) A the owner of two buildings sells one to B retaining the other. B is entitled to lateral support from A's building and A is entitled to the same right B's building.

Acquisition by prescription :

Section 15 deals with the acquisition of easements by prescription. Where access and use of light or air to and for any building have been peaceably enjoyed as an easement and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pressure, or by things affixed thereto, as an easemant, and where a right of way or any other easement, has been peaceably and openly enjoyed by an

title hereto, as an easement and as of right, and these have been enjoyed without interruption for twenty years, they become absolute:

Where government property is concerned the prescriptive period is sixty-years.

This section puts in a codified from the law relating to prescription which has been the commonest mode of acquiring an easement.

The right should have been enjoyed *nec vi nec clam nec precario* i.e, the enjoyment should be without violence, without stealth and without permission. In other words it should be peaceable, open and non-permissive. When it is thus enjoyed, we say it is enjoyed "as of right".

The section deals with the easement of light, easement of support and easement generally. If an easement is enjoyed for twenty years, it provides a sufficient base for making a claim, The enjoyment should be without interruption. It does not mean that there should be actual continuous user by day and night for 20 years without any cessation whatever. An interruption 'within the meaning of the Act is an actual discontinuance or cessation of enjoyment it is by reason of an obstruction. To prove continuous enjoyment it is not necessary to prove bodily contact. The enjoyment continues so long as the claimant's assertion or a continuous right is not interfered, with, whenever he has occasion to use it.

Section 15 does not apply to customary or public rights although they are clajmed because of longuser. A customary easement differs from a prescriptive easement in several respects.

1) A customary easement originals is a custom, and there is no fixed period of enjoyment laid by law to establish customary easement while a descriptive easement arises out of prescription that is to say a continuous peaceable user for 20

years against the property of private individual and against the Government 60 years.

2) A customary easement appertains to many as a class such as the inhabitants of a village or to an individual as such; but a prescriptive easement on the other hand must belong to a single individual as such. In Maharaj Bohadur Singh V. Gandauri Singh. A.I.R 1917 Pat. 640 and H.A. Sarma v. The Union Territory of Manipur A.I.R. 1960 Mani 18 it has been held that an easement at prescription can be conferred only on determine person and not an in determinate and fluctuating body.

3) A customary easement will not be recognised unless it satisfies the essential requisites of custom.

4) A customary easement is a usage annexed to land in a particular locality. A prescriptive easement, is not confined to a particular locality

Immemorial user : Doctrine of Lost Grant and Dedication :

The Indian Easements Act does not prohibit any other mode of acquiring easements under the general law, which is roughly English common law. The Limitation Act, also does not prohibit acquisition of Easement by other mode, The presumption of the lost ancient grant and its rebuttal in English law has not been adopted India where it is usual to consider all the facts and decide whether a legal origin for the right claimed can be reasonably inferred. So the question is near in the form of a rebuttable presumption. Where there is Immemorial user for thirty or forty years it is taken that there is an easement by immemorial user. This inference of immemorial user, is strengthened if there is a user of over fifty years.

In English law a deduction is equivalent to an irrevocably licence granted by the owner of soil to the use of the public. But this concept is not known to Indian law.

In English the user is from 1189 A.D. (year in which Richard I look over the reign, and where user cannot be proved since 1189, then the court allowed the plaintiff to fall back upon lost grant. Thus the right acquired the necessary legal origin. But even such a right had to be attached to land, so an easement in gross could never be acquired on this basis.

A customary right can exist only in relation to the inhabitants of a district and not the public at large. When recognised as good it becomes part of the law of the locality, local law: and the doctrine of a lost grant has no application and more over there could he no grant to a large body of unascertained and fluctuating persons. Therefore no individual of that locality can claim a customary easement, such as a right to remain in possession of, the fishery on the basis of a lost grant or on the basis by a prescriptive right, B. Raja Sundar Dep v. Mony Behra A.I.R. 1951. S ~~C. 2.7~~.

Apart from the Easement Act, where there has been long continual and peaceful possession and enjoyment of a right the courts may presume a grant of the right in question and there is nothing to prevent a claim to title by lost grant being made under the general law.

The rules of lost grant are :

User shown must be as of right. *nec vi neo claim, nec percarie* for a long period of years. (1) The servient owner is not permitted to offer evidence that such a grant has not actually been made (2) But the servient owner may show that throughout the period there has been no person capable of making such a grant.

RIGHTS WHICH CANNOT BE ACQUIRED BY PRESCRIPTION

Section 17 enumerates the rights that cannot be acquired by prescription. They are divided into four kinds. "Ease-

ment acquired under section 15 are said to be acquired by prescription and are called, prescriptive rights.

None of the following rights that can be so acquired;

a) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed;

b) a right, to the free passage of light or air to an open space of ground.

c) a right to surface water, not following in a stream and not permanently collected in a pool, tank or otherwise :

d) a right to underground water not passing in a defined channel".

Section17 (a) : This sub-section provides that no easement can be acquired by prescription if its effect is totally to destroy the servient tenement or render it useless for all practical purposes.

In Jaimaitral v, Goumai 130. I. C. 546 the plaintiffs claimed that they had a right of way by easement of using their neighbour's roof terrace, as a courtyard, for sleeping by night for sitting by day and generally for family festivals. The court held that user of this description, would altogether exclude the owner of the servient tenement from enjoying his tenement, or that such an exclusion would follow as a physical necessity if such a user were granted as an easement. Any user which amounted to a ouster of the servient owner cannot be allowed as a prescriptive easement.

But a riparian owner cannot be prevented from using for ordinary purposes' of water of the river to the full extent permitted by the law even to the extent of taking the whole of the water from the stream. In such a case section 17 (a) cannot be invoked.

Section :- 17 (b) Both under the English law and Indian law the rule laid down in this sub-section is absolute, and no easement of light or air can be acquired except through an aperture.

Section :17 (c) Surface water does not include (a) water flowing in well-defined stream, (b) collected in a pool, (c) tank: or otherwise. Eventhough such water can be identified, it can't be said to belong to any particular person, so no natural right or prescriptive easement.

Section: 17 (d) The percolating water below the surface of the earth is a common reservoir in which nobody has any property, but of which everybody, has the right of appropriation the whole.

Apart from Sec. 17. many other rights are also not acquired by prescription. Some of them are:- Right to have branches overhanging a neighbour's land; Right of Prospect (right to an uniterrupted view from the windows of a house); Right to privacy (though it may be allowed by local custom).

CUSTOMARY EASEMENTS

Section : 18 deals with customary easement, "An easement may by acquired by virtue of a local custom. Such easement are called customary easement".

Illustrations :

(a) By the custom of a certain village every cultivator of village and is entitled as such, to graze his cattle on the common pasture, A having become the tenant of a plot of uncultivated land in the village, breads up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom, (b) By the custom of a certain town on owner or occupier of a house can open a new window therein so a, substantially to invade his neighbour's privacy. Each neighbour has this right against the other neighbour.

From all these it is quite clear that a customary right cannot be a creature of a written instrument. This section simply grants statutory permission for the recognition of customary easements. A customary easement must be appurtenant and not in gross such as a profits-a-prendre. A customary easement remains an easement, But a customary right is not an easement property so called as it is unappurtenant to a dominant tenement.

The following are some of the important customary easements recognised in India :

(i) Right of Privacy : Section 18 gives statutory recognition to such easement. This is due to the social custom obtained in India where in most of the provinces, the custom of the purdha has been strictly observed by both the Hindus and Mohammedians. So a neighbour is not allowed to erect a new building in such a way as would substantially interfer with those parts of his neighbour's house which are used by pardanashin women.

(ii) Right of bury : This is strictly neither an easement nor a mere licence. It is a grant implying that a right once granted cannot be revoked and that the land is dedicated for, burial or cremation purpose.

(iii) Right of worship and celebration : Right of a group of people to worship in a temple, or hold festivals in a particular place, or tying cattle etc, may be a customary right, but not as customary easement.

(iv) Right to take water and grazing rights; are in the nature of customary rights.

(v) Right to cut sugarcane, to extract oil and concentrated juice on a piece of land in the *abadr* is in nature of customary easement and can be acquired by a tenant against the landlord.

It should also be noted that for a customary easement all the tests to be satisfied by a customary right necessary, such as reasonableness, continuous users as of right, definiteness and ancient.

Anything that is dangerous to public health, such as to wash manure in a tank will not be allowed as a customary easement A.S. Pakkir Mohammed Rawther v. Pitchai Thevan A.I.R. 1926. Mad. 625.

Use of the seashore by fisherman for drying fish, nets, keeping their boats etc., is a customary easement. Abbas v. Aindi Chettiar A.I R. 1963 Mad, 74.

Transfer of dominant heritages passes easements :

Section 19 states "where the dominant heritage is transferred or devotees by act of parties or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place".

Illustrations :

A has certain land to which a right of way is annexed A lets the land to B for twenty years. The right of way cast in B and his legal representatives so long as the lease continues.

The principle of English, law, that easements are indissolubly associated with the dominant and servient tenements is codified in this section. (Also in section 8, Transfer of Property Act) Whether the dominant tenement transferred absolutely, or a lesser estate in it is transferred, all, rights which as against third parties the conveying party enjoyed as appurtenant to his estate, pass with it although there is no express mention of such rights and although no such words as "with the appurtenance" or the like are used.

THE INCIDENTS OF EASEMENTS

According to section 20 if .a matter is provided for in any agreement between the dominant and servient owners, the term at the agreement must be enforced and if there is any conflicts between an incident of easement as entered in the mutual agreement and an incident of easement under Chapter III of the Easement Act, the former incident under the agreement must prevail against the later. Likewise an incident of customary easement prevail over the incident arising by rules of this chapter.

Section 21 imposes a prohibition on use unconnected with enjoyment of the dominant heritage. Illustrations : (a) A, an owner of a farm Y, has a right of way over B's land to y. Lying beyond Y, has another farm Z, the beneficial enjoyment of which is not necessary for the beneficial enjoyment of Y. He must not use the easement for the purpose of' passing to and from Z.

b) A, as owner of a certain house, has a right of way to and from it. For the purpose of passing to and from the house the right may be used, not only by A, but the member of his family, his guests, lodgers, servants, workmen, visitors and customers for this is a purpose connected with the enjoyment of the dominant heritage. So, if A lets the house, he may use the right of way for the purpose of collecting the rent and seeing that the house is kept in repair.

Section 22 states that "The dominant owner must exercise his right in the mode which is least onerous to the servient owner : when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner be so confined".

Illustration : (a) A has a right of way over B's field, A must enter the way, at either end and not at any intermediate point. (b) A has a right affixed to his house to cut thatching

grass in B's away A when exercising his easement, must cut the grass in that the plants may not be, destroyed..

Illustration (b) makes it clear that the dominant owner must exercise his easement in such a way that he causes the least amount of trouble and inconvenience to the servient owner: The section also provides that, whenever possible, a part of the servient tenement shall be demacrated for the purpose of exercising the easement.

Section 23 deals with the right to alter mode of enjoyment. It is subject to the provisions of Sec. 22. The dominant owner may from time to time alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage. The exception to this rule is, the dominant owner of a right of way cannot vary his line of passage at pleasure even though he does not thereby impose any additional-burden on the servient heritage.

Illustratiorn : a) A, the owner of a saw mill, has a right to a flow of water sufficient to work the mill. He may convert the saw-mill into a corn-mill provided that it can be worked by the same amount of water.

b) A has a right, to discharge on B's land the rain water from the eaves of A's house. This does not entitle A to advance his eaves if by so doing, he imposes a greater burden on B's land.

c) A, as the owner of a paper mill, acquires a right to pollute a stream by pouring in the refuse liquor produced by making in the mill paper from rags. He may pollute the mill stream by pouring in similar liquor produced by making in the mill paper by a new process from bamboos provided that he does not substantially increase the amount or injuriously change the nature of the pollution.

d) A as a riparian owner, acquires as against the lower iparian owners, a prescribe right to pollute a stream, by throw-

ing sawdust into it. This does not entitle A to pollute the stream by discharging into it poisonous liquor.

In Mohammed Beari v Badava Beari the defendants who had a right of way for purposes connected with a residence subsequently converted it into a storehouse for merchandise. The passage came now to be used for practically all the twenty four hours by bullock carts and hand carts. The courts found that there was additional burden on the servient tenement and passed a decree against the defendants.

On the question of eaves, where the height of the eaves has been raised, it was held that there is no additional burden Mulla Bhana v.Sundar Dana.

So whether there is additional burden the servient, tenement is always a question of fact.

Section 24 deals with rights to do acts to secure enjoyment The dominant owner is entitled, as against servient owner to do all acts necessary to secure the full enjoyment of the easement but such acts must be done at such time and in such manner as with out detriment to the dominant owner to cause the servient owner as little inconvenience as possible; and the dominant owner must repair as far as practicable, the damage (if any) caused by the act to the servient heritage.

Right to do acts necessary to secure the full enjoyment of an easement are called accessory rights.

Illustrations : (a) A has an easement to lay pipes in B's land to convey water to A's cistern. A may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state.

(b) A has an easement of at drain through B's land. The sewer with which the drain communicates is altered. A may enter upon B's land and alter the drain to adopt it to the new sewer, provided that he does not thereby impose any additional burden on B's land.

(c) A as owner of a certain house, has a, right of way over B's land enter. The way is out of repair or a tree is blown down and falls across it. A may B's land repair the way or remove the tree from it.

(d) A as owner of a certain field has a right of way over B's land. B renders the way impossible. A may deviate from the way and pass over the adjoining land of B, provided that the deviation is reasonable.

(e) A, as owner of a certain house has a right of way over B's field. A may remove rocks to make the way.

(f) A has an easement of support from B's wall. The wall gives way. A may enter upon B's land and repair the wall.

(g) A has easement to have his flooded by means of a dam in B's stream. The dam is half swept away by an inundation A may enter upon B's land and repair the dam.

This section confers certain auxiliary rights, upon the dominant owner in exercising these rights, he has to act reasonably and mutual convenience would govern time manner of exercising these accessory rights. Damage has to be made good.

Section 25 deals with expenses incurred in constructing of repairing works or for doing any act necessary for the use or preservation of an easement. The expense has to defrayed by the dominant owner. The exercise of the accessory rights given by section 24 may involve expenses, that is not the liability of the servient owner, but the dominant owner has to incur the expenses.

Section 26 is to the effect "where an easement is enjoyed by means of on artificial work the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair of such work". If drainage an irrelation pipes are not repaired and it contents, leak out and cause injury to the soil the servient owner would be entitled to obtain compensation for such injuries.

Section 27 says that "The servient owner is not bound to do anything for the benefit of' the dominant heritage and he is entitled as against the dominant owner to use the servient heritage in any way consistent with enjoyment of the easement but he must not do any act tending to restrict the easement or to render its exercise less convenient".

Illustrations : (a) A, as a owner of a house has a right to lead water and send sewage through B's land. B is not bound as servient owners to clear the water course or scour the sewer.

(b) A grants a right of way through his land to B as owner of a field. A may feed his cattle on grass growing on the way, provided that B's right of way is not thereby obstructed; but he must not build a wall at the end of his land so as to prevent, B going beyond it nor must he narrow the way so as to render the exercise of the right less easy then it was at the date of the grant.

(c) A in respect of his house, is entitled to an easement of support form B's wall. B is not bound as servient owner, to keep the wall standing and in repair. But he must not pull down or weaken the wall so as to make it incapable of rendering the necessary support.

(d) A, in respect of his mill, is entitled to a water-course through B's land. B must not drive stakes so as to obstruct the water-course.

(e) A, in respect of his house, is entitled to a certain quantity of light passing over B's land. B must not plant trees so as to obstruct the passage to A's windows of that quantity of light.

This section has codified the principle of English law that the liability of the servient owner is entirely negative in character. It is also to the effect that subject to the easement the servient owner can enjoy the tenement as he likes. But as the last part of the section lays down the servient owner should

not do anything that would inconvenience the dominant owner in the exercise of the easement.

Section 28 makes provision for the extent of easement and the mode of their enjoyment. They are ;

Easement of necessity :

An easement of necessity is coextensive with the necessity as it exited when the easement was imposed. It cannot be enlarged beyond the requirements of absolute necessity known to the grantee at time of grant. It is the law both in England and India that an easement of necessity cannot be converred into an easement of convenience which is likely to change its character according to whims and needs of the dominant owner.

Other Easement :

The extent and mode of enjoyment of the easement is to be fixed which reference to the probable intention of the parties and purpose for which the right was imposed or acquired.

In the absence of evidence as to such intention of purpose.

a) Right of way : A right of way of any one kind does not include a right of way of any other kind. A right of any for person cattle, cart etc. over the open ground in front of the plaintiff's house, though established, still does not entitle the defendant for closing the way for sweepers to remove nightsoil from the defendant's premise. But a path" for the passage of men, carts, may entitle the dominant owner to use it for cattle as it dogs not add to the burden on the servient tenement.

b) Right to light or air acquired by grant : The extent or a right to the passage of light air to a certain window, door or other opening imposed by a testamentary or non-testamentary instrument is THE quantity of light or air that entered the opening at the time the testator died or the non-testamentary instrument was made. This is to say that the extent and mode of

enjoyment shall be determined by the quantity of light and air that entered the opening at the time the grant took effect.

c) Prescriptive right to light or air : The extent of the prescriptive right to the passage of light or air to a certain window door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used. If the quantity has from time to time varied during the prescriptive period, the quantify which has been accustomed to enter the opening during the whole of that period, will obviously determine the extent of the right in such cases. It is window or aperture in building that gives birth to this easement and if it has been enjoyed for last twenty years, it is called 'ancient light. In India, easement of air is much coextensive with right to light though in cold climate it consists in to shut out the air and let in the light.

d) Prescriptive right to pollute air and water : The extent of a prescriptive right to pollute air or water is the extent of the pollute on at the commencement of the period of user or completion of which the right arose. If the user of an easement of pollution has varied during the prescriptive period, it is just the initial user that determines the extent, and not the subsequent reduced or enlarged user.

e) Other prescriptive rights : The extant of every other prescriptive right and the mode of its enjoyment be determined by the accustomed user of the right. This means that it is the manner in which and the extent to which the right has been exercised during the prescriptive period.

Section 29 deals with increase of easements. It provides that the dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement.

When an easement has been granted or bequeathed so that its extent shall be proportionate to the extent of the domi-

nant heritage if the dominant heritage is increased by alluvion, the easement is proportionately increased, and if the dominant heritage is diminished by diluvion the easement is proportionately diminished

Save as aforesaid, no easement is affected by any change in the extent of the dominant or the servient heritage.

Illustration :

A, the owner of a mill, has acquired a prescriptive light to divert to his mill part of the water of a stream. A alters the machinery of his mill. He cannot thereby increase his right to divert water.

b) A has acquired an easement to pollute a stream in carrying on a manufacture on its banks by which a certain quantity of four matter is discharged into it. A extends his works and thereby increases the quantity discharged. He is responsible to the lower riparian owners for injury done by increase.

c) A, as the owner of a farm, has a right to take for the purpose of manuring his farm, leaves which have fallen from the tree on B's land. A buys a field and unites it to his farm. A is not thereby entitled to take leaves to manure this field.

The burden of the easement often varies with the size, nature of structure of the dominant tenement. The easement of drainage can also be increased by addition of a source of plentiful supply. The easement of light and air enlarges by increasing the size of the apertures. This section is to the effect that by merely altering or enlarging the dominant tenement, is not entitled to increase the extent of the easement. The word "substantially" used in the section shows that if the alteration merely causes a trifling increase it may not be opposed. So the best test is to apply section 23, which makes only additional burden the crucial test, and which permits alterations that do not make for additional burden. The second paragraph provides the circumstances in which an alteration in tenement is

effective to enlarge the easement. If an easement is created by grant, and if the tenement is increased by alluvion i.e., by the shifting of a watercourse, the quantum of the easement is proportionately increased. But if there is a diminution in the size of the dominant tenement cause by diluvion i e. by floods then there is decrease in the quantum of the easement.

Sections 30 deals with the effect of a partition of dominant heritage "Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares but not so as to increase substantially the burden on the servient heritage; Provided that such annexation is consistent with the terms of the instrument, degree or revenue proceeding (if any) under which the division was made, and, in the case of prescriptive rights, with the user during the prescriptive period".

Illustrations :

a) A house to which a right of way by a particular path is annexed is divided into two parts, one of which is granted to A, the other to B. Each is entitled in respect of his part, to a right of way by the same path.

b) A house to which is annexed the right of drawing water from a well to the extent of fifty buckets a day is divided into two distinct heritages, one of which is granted to A the other to B. A and B are each entitled, in respect of his heritage to draw from the well fifty buckets a day; but the amount drawn by both must not exceed fifty buckets a day.

(c) A having in respect of his house an easement of light, divides the house into three distinct heritages. Each of these continue to have the right to have its windows unobstructed.

When the tenement is divided into two or more tenement the easement becomes annexed to each of the divisions of the dominant tenement.

acquired by prescription or grant do not in any manner militate against such annexation. The second condition is such annexation to all the separate divisional of the dominant tenement should not impose additional burden on the servient tenement.

Section 31 provides that when the dominant owner affects an alteration in the user of an easement and imposes additional burden on the servient tenement, the servient owner may obstruct the user, but only on the servient heritage, provided that such uses cannot be obstructed when the obstruction would interfere with the lawful enjoyment of the easement.

Illustration :

A having a right to the free passage over B's land of light to four windows six feet by four, increases their size and number. It is impossible to obstruct the passage of light through the new windows without also obstructing the passage on the ancient windows. B cannot obstruct the excessive user.

An easement of light and air present a unique feature, in that it involves only innocent acts on the dominant tenement, AND it is only if the right is perfected by user that a restriction can be imposed on the servient tenement. If the dominant owner enlarges ancient windows or opens new ones, the servient owner can get no remedy, as he cannot obstruct the passage of light and air to the new windows or the enlarged windows without obstructing the initial user itself. But if the excessive user of new window or, of the enlarged windows imposes a separable burden section 31 athorises the servient owner to obstruct the additional separable burden. This is the English rule of Taping v. Jones II. H.L.C. 222. This was followed in *Probaburty Dabee v. Mothidrala* 7 Cal. 453

The Disturbance or Easements :

Section 32 of the Act says that the owner of occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person. It should however be

noticed, that it is not every interference with the full enjoyment of an easement that amounts in law to a disturbance: there must be some sensible abridgement of the enjoyment of the tenement to which it is attached, although there need not be a total destruction of the easement. Action also lies for the disturbance of secondary easements which are necessary for the enjoyment of the primary easements. A as owner of a house, has a right of way over B's land C unlawfully enters on B's land and obstructs. A in his right of way A may sue C for compensation, not for the entry, but for the obstruction. The section enables the dominant owner to sue a stranger who obstructs him and obtain a remedy. In *Tarachand Laxman Chara v. Hussain Kalu* A.I.R. 1953 Sau. 13, it was hold that a tenant of the servient owner would be liable for obstruction.

Disturbance - What amounts to? : It is always question of fact as whether a particular act causes disturbance of a right of easement. This question of fact is to be decided with reference to : (i) the nature of an act. (ii) the nature of the easement's and (iii) the circumstances connected with enjoyment of such easement as wall as with the doing of such act.

An act which tends to obstruct or interfere with the user of the right of easement is sufficient to cause disturbance to it, even if' there is no total obstructions. The disturbance must be due to an action done on the servient tenement. The disturbance may be temporary. It may be caused even by a negligent act.

As to the nature of the disturbances which entitles the dominant owner to relief, the following may be noted : (1) The law dose not concern itself with an obstruction which is trivial or immaterial *"De misimus non curat lex"* (2) The law takes not of an obstruction which finds its origin in the ... sentiment of the injured party or in any peculiarity of health or temperament (3) The act or acts complained of must have caused substantial, damage (4) A substantial damage means, there is

an appreciable diminution of enjoyment, or of the value of the dominant tenement or an invasion of the legal rights from when substantial damage will be presumed.

REMEDIES FOR DISTURANCE

Gale suggests two kinds of remedies for disturbance of easements :-(1) by act of party aggrieved; (2) by act of law.

By act of party; Under the first category the remedy is by way of abatement which may be availed of by the party aggrieved by the disturbance of the easement. In *Baten's* Case Coke observed : "There are two ways to redress a nuisance. One by action and in that he shall recover damages and have judgement that the nuisance shall be removed, cast down or abated as the case requires; or the party aggrieved may enter and abate the nuisance himself". The party abating a private nuisance must use reasonable care and no more than necessary damage caused for the purpose and no injury should be inflicted on a third party.

However, abatement by a private individual is not favoured by law under section 36, because entering the servient tenement to abate the nuisance itself is a Wrong; he must go to a court of law.

By act of law *:* Section 33 provides that the owners of any interest in the dominant heritage or the occupier of such heritage may institute a suit for compensation for the disturbance of the easement or any right accessory thereto provided that the disturbance has actually caused substantial damage to the plaintiff.

Section 33 states : "The owner of any interest in the dominant heritage or the occupier of such heritage, may institute a suit for compensation for the disturbance of an easement or of any right-accessory there to provided that the disturbance has actually caused substantial damage to the plaintiff.

Expl. I. The doing of any act likely to injure the plaintiff by affecting the evidence to the easement or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this section 34.

Expl. II. Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section unless it falls within the first explanation or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to the institution of suit.

Expl. III. Where the easement disturbed is a right to the free passage of air to the opening in a house, damage is substantial within the meaning of this section if it interferes materially with the physical comfort of the plaintiff though it is not injurious to his health.

Illustrations :

a) A places a permanent obstruction in the path over which B, as tenant of C's house, has right of way. This is substantial damage, to C. for it may affect the evidence of his reversionary right to the easement.

b) A, as owner of a house, has a right to walk along one side of B's house. B builds a verandah overhanging the way about ten feet from the ground, and so as not to occasion any inconvenience to foot- passengers using the way. This is not substantial damage to A.

Section 34 "The removal of the means of support to which a dominant owner *is* entitled does not give rise to a right to recover compensation unless and until substantial is actually sustained.

Section 35 : "Subject to provisions of the Specific Relief Act 1877, (section 52 to 57 both inclusive) an injunction may be granted to retain the disturbance of an easement .

a) If the easement is actually disturbed when compensation for such disturbance might be recovered under this chapter :

b) If the disturbance is only threatened or intended—when the act threatened or intended must necessarily, if performed disturb the easement".

Explanation I section 33 deals with easements generally and lays down the criteria which would make the damage substantial, The criteria is (i) if the evidence of the easement is affected by the obstruction; and (ii) if the value. i.e., the market price of the dominant heritage is materially diminished by the obstruction.

Explanation II section 33 deals with an easement of light and it gives an exhaustive criteria which would make the damage substantial. Apart from two conditions in Expln. I, It gives two additional conditions that have to be satisfied and those are *(i)* that the obstruction should have materially interfered with the physical comfort of the plaintiff: and that the obstruction should have prevented the plaintiff from carrying on the accustomed business in the dominant heritage as beneficially as he had done previous to the institution of the suit. From this it follows, that an infringement of an easement to light will be actionable only if it fall within the scope of any-one or more of the four criteria stated above. These principles were borrowed from the English case of Colls *v. Home And Colonial Stores* 1904 A.C.119 (H.L).

Lesson - 10

EXTINCTION OF EASEMENTS

Generally an easement may be extinguished in various ways-(1) by Act of Parliament *(2)* by operation of law and (3) by the act of the dominant owner such as release, actual or presumed or abandonment. It should be noted that an easement can never be extinguished, or abridged by the act of the servient owner.

By Act of Parliament :

An easement may be extinguished by an Act of Parliament either by express terms of the Act or by implications, e.g., in *Corporation of Yarmouth v. Simmons* 10 Ch O. 518 it was held that where an Act of Parliament authorized the construction of a pier at the end of a street, at a place where the public were in the habit of passing from the street to beach, and the pier blocked up the way public right of way *was* extinguished though the Act was silent on the subject.

By operation of Law :

If the privilege has been granted for a particular purpose and the purpose accomplished : easements of necessity are extinguished when the necessity ceases, Basement granted for a term extinguished when the term comes to an end either by efflux of time, or by surrender, forfeiture or merger,

Alteration in the condition or character of the dominion heritage may frequently cause the extinction of an easement by operation of law. Alteration may enlarge the burden on the servient heritage then it becomes a question whether an easement has been extinguished or not if there is a merger of the ownerships in one hand, then there is an extinguishment of the easement. By *act* of the dominant owner : By it release, i. e. by a regrant of the right by the dominant to the servient owner. Such

release' may be either actual or implied. Non-user by itself may not amount to release of abandonment. It is always a question as to the intention with which the user ceased.

(1) Extinction of Easement under the Act Extinction of an easement by dissolution of right of servient owner— Section 3. "When from a cause which preceded the imposition of easement, the person by whom was it imposed the imposition of an easement, the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished".

Illustrations :

(a) A transfers Sultanpur B on condition that he does not marry C, B imposes an easement on Sultanpur. Then B marries C.B's interest in Sultanpur ends, and with it the easement is extinguished.

b) A mortgages to B, and lawfully imposes an easement on the land in favour of C in accordance with the provisions of section 10. The land is sold to D in satisfaction of the mortgage debt. The easement is not thereby extinguished.

Illustration (b)

Illustrates exception to Section 37. This section applies only to easement by grant.

2) Extinction by release Section 38 : When a dominant owner releases it expressly or impliedly, to the servient owner,

Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the *dominant heritage.*

An easement may be released as to part only of the servient heritage.

Explanation : 1 - An easement is impliedly released a) when the dominant owner expressly authorizes an act of a permanent na-

ture be done on the servient heritage the necessary consequence of which is to prevent his further enjoyment of the easement, and such act is done in pursuance of such authority.

b) Where any permanent alteration is made in the dominion heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.

Explanation II - Mere non-user of an easement is not an implied release within the meaning of this section.

Illustrations : *(a)* A. B and C are co-owners of a house to which an element is annexed. A without the consent of. B and C. releases the easement. This release is effectual only as against A and his legal representatives.

b) A grants to B an easement over A's land for the beneficial enjoyment of his house. B assigns the house to C. B then purports to release the easement. The release is ineffectual.

c) A having the rights to discharge his eaves—droppings in B's yard expressly authorizes B to build over his gard to a height which will interfere with the discharge B builds accordingly. A's easemant extinguished to the extent of the interference.

d) A having an easement of light to a window, builds up that window with bricks and mortar so as to manifest an intention to abandon the easement permanently. The easement is impliedly released.

e) A, having a projecting roof by means of which he enjoys an easement to discharge eaves dropping on B's land permanently alters the roof so as to direct the rain-water into a different channel and discharges it on C's land. The easement is impliedly released.

Section 38 deals with both express release and implied release. Express release occurs by a declaration oral or written because there is no statute requiring an express release to be

written. So far as implied release is concerned the facts must be looked into, to ascertain whether an inference of voluntary abandonment can be made out,

3) Extinction by revocation Section 39 : "An easement in extinguished when the servient owner, in the exercise of a power reserved in this behalf, revokes the easement."

4) Extinction on expiration of limited period or happening of dissolving condition-section 40 : An easement is extinguished where it has been imposed for a limited period, or acquired on condition that it shall become void on the performance or non performance of a specified act and the period expires or the condition is fulfilled"

5) Extinction on termination of necessity— section : 41 "A easement of necessity is extinguished when the necessity comes to an end." Illustration : A grants B a field inaccessible except by passing over A's adjoining land B afterwards purchases a part of the land which he can pass to his filed. The right of way over A's land which B had acquired is extinguished.

It has already been seen that an easement of necessity is an easement without which the property cannot he used at all and not merely one for the reasonable enjoyment of the property and that in considering whether it is an easement of necessity or not, convenience is not the test but absolute necessity. It should also be noted that once an easement of necessity is extinguished it cannot be revived even on the reappearance of the necessity,

6) Extinction of useless easement —Section 42 :"An easement is extinguished when it becomes incapable of being at any time and under any circumstance beneficial to the dominant owner".

7) Extinction by permanent change in dominant heritage ; Section-42 : Where by any permanent change in the dominant heritage, the burden on the servient heritage is materially in-

creased and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished unless.

a) it was intended for the beneficial enjoyment of the dominant heritage, to wherever extent the easement should be used; or

b) the injury caused to the servient, owner by the change is so slight that no reasonable person would complain of it; or

c) the easement is an easement of necessity.

Nothing this section shall be deemed to apply to an easement entitling the dominant owner to support the domi- nant heritage".

8) Extinction on permanent alteration of servient heritage by superior force. Section 44 : It is so permanently altered that the dominant owner can no longer enjoy such easement. But an exception has been made in the case of an easemant by way of necessity. In which cast the dominant owner has a right to a fresh way of necessity. Illustrations - (a) A grants to B, as the owner of a certain house a right to fish to a river running through A's land. The river changes its course perma- nently and runs through C's land. B's easement is extinguished.

b) Access to a path over which A has a right of way is permanently cut off by an earthquake, A's right is extinguished

Section 44 relates to the extinction of an easement be- cause of permanent alteration of servient heritage by superior force and therefore where a bridge or channel or well are brought about not by any superior force but by the defendant who raised the bund or channel Section 44 has on relevance.

9) Extinction by destruction of either heritage: Section 45 Illustration. A has a right of way over a road running along the foot of a sea eliff . The road, is washed away by a permanent encroachment of the sea. A's easement is extinguished.

10) Extinction by unity of ownership— Section 46 : An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages. This is by merger. If either the dominant owner or the servient owner acquires only a part of the other heritage then the easement is not extinguished, if the servient owner acquires the dominant heritage in connection with a third person, then the easement is not extinguished.

If there is unity of possession where the same parson has ownership in one tenement, but only a limited estate in the other tenement, there is only a suspension of the easement under section 49, but not extinction under this section. An easement of way is not extinguished by the dedication of the servient tenement to the public

11) Extinction by non-enjoyment - section 47 : Section 47 lays down that continuous easement are extinguished when they are totally ceased to be enjoyed as such for continuous i.e unbroken period of twenty years.

What is meant by non - enjoyment? Mere non- user does not amount to enjoyment within the meaning of this section, as to be sufficient to extinguish an easement. The section itself prescribes the circumstances that render non-user to amount non enjoyment of such a nature as to be capable of extinguishing an easement and enjoyment by a co- owner is enough to continue the enjoyment and prevents extinction under this section; because in law the enjoyment by one co-owner of the dominant heritage is deemed to be the enjoyment by all.

There is a proviso that enjoyment with a variation, that is an enjoyment which is different in point of time, place or purpose from the real easement does not avail to prevent extinction under this section.

Where it is an easement of necessity it is only extinguished when the necessity comes to an end.

Where right of way extends to several continuous heritages, the exercise of the right over one of such heritages is enough to save extinction under this section. Illustrations A has annexed to the house, fights of way from the highroad thither over the heritages X and Z and the intervening heritage Y. Before the twenty years expire A exercises his right of way over X. His rights of way over Y and Z are not extinguished. Not only this illustration appended to the section, the last paragraph of the section itself is quite clear: "when several heritages are respectively subject to rights of way for the benefit of a single heritage and the ways are continuous, such rights shall for the purpose of this section be deemed to be a single easement.

When the non- enjoyment is due to a contract between the dominant and servient owners the easement is not extinguished.

Extinction by non- user— Difference between English and Indian Laws:

Under section 47 the circumstances which will suffles a non-user to be taken as non-enjoyment are the following :

a) if the servient owner obstructs the exercise of the continuous easement by some positive act.

b) if the dominant owner himself does something that renders the exercise of the easement impossible.

But in case of discontinuous easement a non- user would amount to non enjoyment and so capable of extinguishing an easement if it has not been enjoyed as an easement for twenty years reckoned from the day on which it was last enjoyed by any person as a dominant owner.

According to English law a more non-user of the right does not extinguish the right. There is no fixed time during which there should be non-user in order or result in extinguish-

ment of the easement. English law says that non-user *per se* is no bar built can provide presumptive evidence of abondonment of the right for example in *Ward v. Ward* (1852) 7 Ex. 838 it was held the right of way was not last by a mere non user for more than twenty years. The way was not used because the owner had a more convenient mode of access through his own property, Alderson B said; "The presumption of abondonment cannot be made from the mere non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment, the non user therefore must *be* the consequence of something adverse to the user'.

Extinction of accessory right- Section 48:

It says that when and easement is extinguished any right that is accessory to it is also extinguished. Illustration—A has an easement to draw water from B's well. A accessory there to he has a right of way over B's land and from the well. The easement to draw water is extinguished under section 4 The right of way is also extinguished.

Suspension of easement-Section 49 :

When either of the two owners of the heritages becomes entitled, to possession of the other heritage for a limited interest there in the easement is suspended. Here there is merger of the two tenement in the same individual and results in unity of possession. The right is not extinguished unless there is a complete fusion of the two estates in fee simple.

Suspension is different from extinction. Suspended easement may (recognized under Sec. 49) be revived but the easements that are extinguished under provisions of Section 37 and 48 are never revived, If both the properties happen to vest in interest in either of them. Dominant or servient owner, it is known as extinction, But if estates remain separate but possession of both vest in them either - of this situation gives birth to suspension.

The unity of possession causes suspension of easements. But it will not do so if it is obtained by encroachment from either side due to trespass.

In India if suspension continues for an unbroken period of 20 years, it will cause extinction of easement. But English law is different. Easement suspended is never extinguished, merely on the ground of suspension howsoever long it may be.

Illustration:

The dominant owner took possession of the servient tenement as lessee and so remained in possession for more than 20 years. The easement was of way; under Sec. 49 the easement was suspended due to unity of possession. Under Sec. 47 due to non-enjoyment for more than 20 years, after suspension the easement extinguished thereafter.

Revival of easement:

Section 51 : According to section 51, an easement extinguished under section 45 revives (a) when the destroyed heritage is before twenty years have expired restored by the deposit of alluvion; (b) when the destroyed heritage is a servient building before twenty years have expired such building is a rebuilt upon the same site; and (c) when the destroyed heritage is a dominant building and before twenty years have expire such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.

An easement extinguished under section 46 revives when the grant or bequest by which the unity of ownership was produced is set aside by the decree of competent court. A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause.

A suspended easement revives if the cause of suspension is removed before the right is extinguished under section 47.

Illustration :

A, as the absulute owner of field Y, has a right of way thither over B's field Z. A obtains from B a lease of Z for 20 years. The easement is suspended so long as A remains lessee of Z. But when A assign the lease to C or surrenders it to B the right of way revives.

The first paragraph makes provision for the revival of an extinguished easements by the complete destruction of either heritage, if the *status quo* is restored within twenty years, easement so destroyed shall revive.

The second paragraph provides that if the grant or bequest that has brought about unity of ownership is set aside by a court of law the easement that might have been extinguished under section 46 by such void fusion revives. It also provides that as easement of necessity extinguished by unity of ownership under section 46 revives if any cause whatever brings about a severance of the united estate into its former components.

The third paragraph provides that if an easement has remained suspended for less than twenty years, *it* would be revived When the cause of suspension is removed.. But if the suspension to a continued for more than twenty years, then the effect of section 47 itself would be to extinguish it.

LICENSE

Nature of License :

An important distinction between an easement and a license, to the use of land in particular manner is that, whereas an easement cannot be extinguished merely at the will of the grantor, a license, is generally revocable at the will of the grantor. A license is merely personal and does not run with the land. A deed generally is necessary to easement, but not necessary to grant a license.

License, may also be implied from the passive acquiescence of the grantor in the act of the license. A license can also be implied from the circumstance. A mere license does not create any estate of interest in the property to which it relates. It only makes an act lawful which without it would be unlawful. It is assignable. If no expense was been incurred upon it by the licensee, is revocable by the grantor, if expense has been incurred and property brought into the land then licensee is entitled to reasonable notice and time to remove such property If the revocation is a breach of contract, the licensee can recover damages for the breach.

License coupled with grant of an interest : Such a license is not revocable on assignment, and covenants may be made to run with it. A right to enter on land and enjoy a *profit-prendre* or other incorporeal hereditament is a license coupled with an interest is revocable.

License and lease :

In a lease there is exclusive possession of the hereditament; whereas in a license there is no such exclusive possession as in a license the property over which the license is exercised is in the control and possession of the grantor. The grantor nevertheless can not grant fresh licences so as to defeat the purpose of the first license.

Definition of license-Section 52:

"Where one person grants to another or to a definite number of other persons a right to do or continue to do, in or upon the immovable property of the grantor, something which would in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license".

From the definition it is clear that like an easement, a license is a right exercisable on the immovable property of another. As the definition eliminates an easement and other interests in immovable property a right cannot be both a license and an easement or an interest in immovable property. Therefore, if a right is to be proved to be a license, it must be shown that is neither an easement nor an interest in immovable property.

Different kinds of License :

A license is a permission to do something which, without the license would not be allowable. A license may be a bare license which is purely a matter of personal privilege or a license maybe coupled with a grant or interest which will not amount to an interest in land.

A personal privilege :

It is open to the grantor to withdraw the permission it the license is a revocable license. Whether it is revocable or inrevocable, a license is nothing more than a personal privilege. It does not require any formalities for its creation As already seen the very-definition of a license denotes that no interest in property in respect of which it is granted is created. It is not connected with the ownership of property for unlike an easement a license is not grantee for the enjoyment of any other property belonging to the license. This may be expressed by say "the quality of appurtenance" which is the *sine qua non* of an easement is not essential in a licence. It is also as non-transferable and non-heritable right.

A license is granted for the purpose of doing or continuing to do some positive act on the immovable property of the grantor. A licence is in the nature of a positive right and not a preventive right So a right to prevent the owner of immovable property from doing something on his property cannot be a licence.

An easement cannot usually arise out of permission, apart from grant, whereas a license originates in permission.

The distinction between a license and an easement can be summarized as follows.

License	Easement
1. Originates in permission	Originates in grant (actual, con structive or inferred) or prescriptive user.
2. A purely personal privilege wholly unconnected with the ownership of property.	It is a right appurtenant to immovable property.
3. Not transferable except in the case of a license to enter place of entertainment.	It passes with property in whom soever hands it is transferred
4. It does not create an interest in immovable property and therefore a licence is not entitled to sue in his own name.	It creates an interest in immovable property and therefore an owner a well as an-occupier of the dominant heritage is entitled to sue for an infringement of his rights in his own name.
5. There cannot be a license to present someone else from dealing with his property in and way.	There can be easement of that nature
6. A transferee of the grantor or license is not bound by the licence.	An easement is enforceable against any one in whose hands the property, over which it is exercisable passes.

DISTINCTION BETWEEN LEASE AND LICENCE

The Supreme Court ease of *M.N. Clubwala v. Fids Hussain Sahab* A.I.R 1965 S.C. 610 has clearly brought out the distinc-

tion between a license and a lease. Its observation was : "While it is true that the essence of a license that it is revocable at the will of the grantor the provision in the license that the licensee would be entitled to a notice before being required to vacate is not inconsistent with a *licence*. In England it has been held that a contractual license may be revocable or irrevocable according to the express or implied terms of contract between the parties. It has further been held that if the licenses under a recovable license has being property on to the land, he is entitled to notice of revocation and to a reasonable time for removing his property, and in which to make arrangements to carry on his business elsewhere. Thus the mere necessity of giving notice to a licensee requiring him to vocate the licensed premises would not indicate that the transaction was a lease".

A lease is a transfer of a right to enjoy the premises whereas a license is a privilege to do something on the premises which otherwise would be unlawful. The transaction is a lease if it grants an interest in the land. The underlying assumption in the case of a licence is that the owner continues to be in possession and control of the property. Mukerjee J. *in Secretary of State, v. Karuhakami* 55. Cal. 82 emphasised the distinction between a lease and license in the following terms; The cardinal distinction is that in a lease, there is a transfer of an interest in land whereas in the case of licence there is no transfer of interest although the licence acquires a right to occupy the land". In *Indian Hotels* Co, v. *Phiroz* 20. Bom. L.R..84. it was held the mere fact the defendant had that exclusive use of a particular cubicle for his carriage horses for two years and that it was the intention of the parties that none else should use the cubicle So long as the defendant kept the car in the premises will not amount to a lease.

The best test is whether the "exclusive possession" was with the grantor or the grantee. If the right granted to the grantee conveys, the exclusive right of possession through subject to certain reservations it is a lease.

It should also be noted that (1) as lessee can be assigned to a third person but not a licence., as it is only a personal right: (2) A lessee can bring an action for trespass in his own name but not of licensee. He must do so in the name of the licensor after obtaining his permission. (3) A lease is not revocable but a licence is revocable except in the cases mentioned in section 60. A lease is an inheritable right but not a license and (5) a lease under certain circumstances determines by forfeiture There is no such provision where a license is concerned.

Power to grant license :

Section 53 says that "a license may be granted by any one in the circumstances and to which he may transfer his interests in the property affected by the licence".

Section 53 is similar to section 8 relation to easements. There is one difference, a co-owner would not be entitled without the consent of the other co-owners to grant an easement, while he would, be entitled to grant a license in respect of the property in which he may have a right as co-owner as far as the grant of such license would not amount to an unreasonable user of the joint property. So a license by a cotenant or his mortgagee, who is lawfully in sole possession and enjoyment of the property to do a thing which he could himself lawfully do is a valid license.

License how created :

According to section 54, "the grant of a license may be expressed or implied from the conduct of the grantor and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create licence"

No writing or registration is necessary for the creation of a license, the conduct of parties may lead to the presumption that a license has been granted. Any instrument which

because of the absence of a certain element such as registration fails to have its required effect such as transfer of an interest in property as well as a license will operate as a license. The license so created, though it would have been irrevocable if the transfer of property accompanying it were effective would merely remain a revocable license, because the transfer of property fails.

A license may be inferred from the conduct of the parties. The equity Romason v. Dyson (1805) L.R.I.H.C. 129 is to the point. There the House of Lords laid down, "If a man under verbal agreement with a landlord for certain interest in land or what amounts to the same thing under an exception created and encouraged by the landlord that he shall have a certain interest takes possession of such land, with the consent of the landlord and upon the faith of such promise or expectation and with knowledge of the landlord and without objection by him lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation. This is called the doctrine of "estoppel".

Accessory license annexed by law :

Section 55 States " All licenses necessary for the enjoyment of any interest, or the exercise of any right, are implied in the constitution of such interest or right. Such licenses are called 'necessary licenses'.

Illustration :

A sells the trees growing on his land to B.B.. is entitled to go on the land and take away the trees.

The section embodies the wall recognised principle that when a right is granted in something, everything which is necessary for the enjoyment of the interest or right is also deemed to have been granted with it. It should also be noted that if accessory licenses are co-extensive with the right. the con-

tinue as long as the right or interest to which they are not revocable at the will of the grantor.

'Accessory license' is not permanent name of any liberty. Every principal license is bound to need some incidental adjustments howsoever minor it may be in the circumstances concerned. Accessory license in fact completes the license expressly granted or implied. The accessory Licenses are privileges based on implication. So, they will not be available when some or anyone of these is expressly reserved by the grantor or when it is provided that it shall not be available to licenses, though it forms part of the interest of right for which license has been granted. They cannot be retained after principal license is terminated.

License when transferable :

Section 36 states when a license is transferable. It provides : (1) A license being a mere persons privilege is not ordinarily transferable and can be exercised only by person to whom it is granted unless there is a contrary intention expressed or implied, in which case it can be transferred and exercised by others.

So far as places of public entertainments are concerned, by virtue of section 6 a drama or a cinema ticket is ordinarily transferable but it can bo made non-transferable by specially making it as such. A license which can be exercised only personally, can also be exercised through an agent or servant.

Duties of the Grantor :

(1) section 57 deals with the duties of the grantor: The grantor of license is bound to disclose to the licensee any defect in the property affected by the license likely to be dangerous to the person or property of the licensee of which the grantor is and the licensee is not aware".

If the failure to disclose such defects leads to injury to the licensee, the licensor would be liable in damages at common law.

2) Section 58 lays down the grantor duty not to tender the property by doing anything likely to render the property unsafe.

Both the sections will apply only when there is willfulness on the part of the grantor, whereas the earlier section will apply when the grantor had not known the defect at the time of making the grantor the granter himself was aware of the defect on it there was no likelihood of its being dangerous to the person or the property of the grantor or no loss is caused to the grantee by such defect or for want of such disclosure. Section 8 will not apply if there was no wilful act on the part of the grantor to render the premises dangerous. A mere omission to keep the property in repairs and to warn the license of its unrepaired condition is not sufficient to make the licensor responsible for injury caused to the licensee. But if the licensor places an instruction on the land or any other thing likely to make the promise dangerous, then he is of course liable.

Section 59 states as the license is a personal privilege. If the property is transferred by the grantor, the transferee is not affected by the licence nor is he bound by it as the license is determined on the transfer of the property. But section 59 is subject to section 6 , in the sense where the license is irrevocable under section 60, a licensor cannot put an end to the licence by mere transfer of property affected by the licence and as such a transfer does not ipso facto extinguish a licence. So as the transferee cannot get a better title than his transferor, the transferee, cannot revoke the licence.

License when revocable :

Section 60 states " A licence may be revoked by the grantor, unless (a) it is coupled with a transfer of a property and such a transfer is in force. (b) the licenses, acting upon the license has executed a work of prominent character and incurred expanses in the execution".

It is no doubt by its very nature revocable because a license Tests on permission and such permission can be withdrawn. However section 60 states when exceptional circumstances which make the licence irrevocable. Thus when a licence is coupled with a transfer of property and such transfer is in force, or when a licensee has been acting upon the licence and expended money on a work of permanent character, the licence becomes irrevocable.

The two exceptions are based on the principle, the first, that a grantor cannot derogate from his own grant which governs the general law of transfer of property and the second exceptions is based on the principle of estopped by acquiescence.

It is found that the section has laid down the two tests of irrevocability. A licence is prima *facie* irrevocable when it is coupled with a grant or interest or because of the construction of a permanent nature by incurring expenses on it. Also there is nothing preventing the parties making revocable licence into an irrevocable one.

You may ask how a licence coupled with a grant differs with one coupled with an interests. The former is a right to do or continue to do something but in addition to it allows the licensee to be benefitted with the product of the *sell.* But the latter operates as an appurtenance to the property and runs with it into the hands of transferees and they are mostly accessory *being* either express or implied and necessary for the enjoyment of the interest transferred under the licence.

A licence does not require registration, but if it is coupled with a grant which require registration, want of registration would make the grant void, but a licence being independent the grant, would continue to be a licence simpliciter and revocable.

Section 61 provides that the revocation of a licence may *be* expressed or implied.

a) A, the owner of a field, grants a licence to use a path acrose it. A with intent to revoke the license looks a gate across-the path. The licence is revoked.

b) B, The owner of a filed, grants a licence to B to stock hay on the field. A lets or sells the field to C, The. license is revoked.

Licence When deemed revoked :

Section 62 deals with all the circumstances which bring about the revocation of a licence ;-

a) When, from a causa preceding the grant of it, the grantor ceases to have any interest in the property affected by the licence.

b) When the licence release it, expressly or impliedly to the grantor or his representative.

c) Where it has been granted for a limited period or acquired on condition that it shall become void on the performance or non performance of a specified act, and the period expires or the condition is fulfilled;

d) where the property affected by the licence is destroyed or by superior force so permanently altered that the license can no longer exercise his right.

e) where the licensee becomes entitled to the absolute owner ship of the property affected by the licence;

f) where the licence is granted for a specified purpose and the purpose is attained, or abandoned or becomes impracticable.

g) where the licence is granted to the licenses as holding a particular office, employment or character, and such office, employment or character ceases to exist.

h) where the license totally ceases to be used such as for an unbroken period of twenty year, and such cessation is not in purruance of a contract between the granter and the licensee.

i) In the case of an accessory license, when the interest or right to which it is accessory ceases to exist,

Licensee's right on revocation :

Section 63 says "where a licence is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby and to remove any goods which he has been allowed to place on such property".

Whether it is a revocable licence or an irrevocable one reasonable notice should be given to the licensee giving him reasonable time to vacate the premises If he is summarily evicted from the premises, in the case of a revocable licence he can get damages. If irrevocable then an action for either injunction, or damages will lie. But in the case of a contractual licence , the terms of the contract will govern the conduct and remedies of party *Dominion of India v. Sohanlal* A.I.R, 1950 *Pepsu* 40

Licensee's right on eviction :

Section 64 provides where a licence has been granted for a consideration and the licence without any fault of his own, is evicted by the grantor before he has fully enjoyed under the licence, the right for which he contracted be is entitled to recover compensation from the grantor"

It follows from this section that if a license is not given for consideration on right for damages can arise for any improper action under this section. So the rule in section of applies only where consideration has passed. The other condition for the application of his section is that the license must be evicted without his fault. If he is at fault being in breach of any condition then he cannot invoke this section. This rule does

not apply to irrevocable licences. It only provides for compensation in respect of a withdrawal of a license contrary to the term of the agreement creating a licence, when the licensee had paid a consideration for the licence and was evicted without any fault on his part and before he had fully enjoyed under the licence the right granted.

It must also be noted that the section applies only to those cases where the grantor evicts the grantee, and not to those cases where the eviction is caused by a third party.

Model questions :

1. State the circumstances under which easement are extinguished.
2. State law regarding revival of easement.
3. Define 'licence' and distinguish between licence and easement.
4. State in what cases a licence is deemed to be a lease.

MAY 1995.

THE LAW OF PROPERTY AND EASEMENTS

Time : Three hours. **Maximum : 100 marks.**

Answer any SIX questions

All questions carry equal marks.

1. Define Vested Interest and contingent Interest and point out the distinction between them. Give illustrations.

2. State the law relating to improvements made by a bonafide purchaser of immovable property under defective title.

3. Explain the Rule against perpetuity.

4. Explain the Doctrine of feeding the estoppel.

5. (a) How far is the Doctrine of 'Caveat Emptor' applicable to Sale of immovable Property? (b) Explain Unpaid Vendor's lien.

6. Define mortgage. Point out the legal incidents of simple mortgage and mortgage by conditional sale.

7. Define a lease. State and explain the duties of a lessee.

8. Discuss the various modes of acquisition of an easements.

9. Write short notes on any THREE of the following:

   (a) Attestation.

   (b) Revocable gift.

   (c) Negative easement.

   (d) Spes Successions.